TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1340~~ 956 ~~623~~ 249

THE RED RIVER CATTLE COMPANY OF TEXAS, FRANK HOUSTON, E. T. MORRIS, AND JOHN H. BELCHER, PLAINTIFFS IN ERROR,

vs.

ALFRED SULLY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 15, 1888.

SUPREME COURT OF THE UNITED STATES.

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No. 1340.

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a MONDAY, *January* 9, 1888.

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court for the northern district of Texas, at the city of Dallas, in Dallas county and said district, on the 9th day of January, A. D. 1888, it being the second Monday in said month, in said year, and being the day fixed by law for commencing a regular term of said court at said place—present and presiding, the Hon. A. P. McCormick, United States district judge for the northern district of Texas; C. B. Pearre, United States attorney for said district; W. L. Cabell, United States marshal for said district, and A. J. Houston, clerk of said court—when and where the following proceedings were had, to wit:

1 *Agreement for Omission of Papers.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

ALFRED SULLY
vs.
RED RIVER CATTLE CO. OF TEXAS *et al.* } No. 900.

Whereas the defendants, The Red River Cattle Co. of Texas, John H. Belcher, E. T. Morris, and Frank Houston, have sued out a writ of error to the Supreme Court of the United States from the final judgment rendered in this cause February 16th, 1888:

Now, therefore, it is admitted that this suit was commenced in the district court of Donley county, Texas, on the 9th day of December, 1885, and was duly removed into the circuit court of the United States for the northern district of Texas on the 8th day of January, 1886, and a copy of the record duly filed with the clerk of said court, at Dallas, Texas, on the 12th day of January, 1886; and each party having filed new pleadings so as to render said copy of said record immaterial on writ of error, it is agreed, for the purpose of saving costs, that the clerk omit the copy of said record from the transcript. This April 9th, 1888.

(Signed) G. A. BROWN AND
A. T. WATTS,
Attorneys for Plaintiff.

(Signed) DAVIS & GARNETT,
Attorneys for Defendants.

(Endorsed:) No. 900. Alfred Sully *vs.* Red River Cattle Co. of Texas *et al.* Agreement for the omission of papers in tran-
2 script. Filed April 17, 1888. A. J. Houston, clerk.

Pl'ff's 1st Amended Orig. Petition.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

ALFRED SULLY
vs.
THE RED RIVER CATTLE CO. OF TEXAS *et al.* } No. 900.

Now comes the plaintiff and, by leave of the court first had, *and* amends his original petition, filed herein December 9th, 1885, and for amendment says:

To the hon. circuit court aforesaid:

Alfred Sully, who is a citizen of the State of New York, and residing in the city, county, and State of New York, and who is hereinafter styled plaintiff, complaining of the Red River Cattle Company of Texas, a corporation duly organized and existing under and by virtue of the general laws of the State of Texas, and having its principal office in the city of Gainesville, Cooke county, Texas, and Frank Houston, a resident citizen of Kaufman county, Texas, and John H. Belcher and E. T. Morris, both of whom are resident citizens of said Cooke county, Texas.

For that heretofore, to wit, December 29th, 1883, the defendant, "The Red River Cattle Company of Texas," bargained and sold to plaintiff all that certain stock of cattle belonging to the said defendant company, then situated and running on the range and pasture of said company in the counties of Donley and Gray, in the State of Texas.

That said defendant company, by and through its authorized officers and agents, at and before plaintiff made said purchase, represented and guaranteed to him that there were then and there
3 three thousand and seven hundred (3,700) head of said cattle belonging to said company in said stock running on said range and said pasture, and did as aforesaid bargain and sell to plaintiff thirty-seven hundred head of cattle as aforesaid, the same being in the following brands, to wit:

P F. and .

That, in addition to said cattle, the said defendant company at the same time bargained and sold to plaintiff forty-five head of saddle horses and about sixteen head of stock horses, two mules, two wagons, and all the camp equipage then belonging to the ranche of said company; that the consideration which plaintiff then and there agreed to pay and which the defendant company agreed to accept for all of said property so bargained and sold to plaintiff was the sum of eighty-five thousand dollars. The agreed price of said cattle between plaintiff and defendant company in said transaction was twenty-two & $\frac{50}{100}$ dollars per head. That, to wit, about Janu-

ary, 1884, plaintiff paid to said defendant company on said property the sum of about fifty thousand dollars.

Plaintiff represents that, to wit, March 29th, 1884, the said defendant company, in furtherance of its said contract and agreement with plaintiff, did, through its president, Frank Houston, make, execute, and deliver to plaintiff a conveyance or bill of sale of the said thirty-seven hundred head of stock cattle, and said horses, mules, wagons, and camp equipage, under and by which it was agreed and understood that plaintiff was to gather said cattle,
4 and that plaintiff was to commence gathering said cattle some time between the 20th day of April, 1884, and May 1st, 1884, and said defendant company was to place a man on the ground to superintend the counting of said cattle as they were gathered, said count to include all stock belonging to said defendant company existing on December 29th, 1883, the plaintiff paying all the expense of gathering and counting the same.

It was also provided therein that if upon a full count there should be less than thirty-seven hundred head of said cattle, including the winter loss since December 29th, 1883 (the said loss to be estimated by disinterested stockmen of the Pan Handle country competent to ju-ge in such matters), then said defendant company should deliver to plaintiff on said range a sufficient number of cattle to complete the required number of thirty-seven hundred head; and it was further provided therein that if there should be more than thirty-seven hundred head plaintiff was to pay to the defendant company for such excess at the rate of twenty-two & $\frac{50}{100}$ dollars per head, which said contract or bill of sale is hereto attached as part hereof, marked Exhibit No. 17.

Plaintiff further represents that he did, in accordance with said contract with the defendant company and in furtherance thereof, proceed to gather and have gathered the said cattle so bargained and sold him by the defendant company, and that he exercised great care and due diligence in gathering and having the same gathered during said year of A. D. 1884; and after diligent, careful, and continuous hunting of the entire range he was only able
5 to find, gather, and have gathered twenty-eight hundred and eighteen head of said cattle during said year, all of which were duly and correctly counted and numbered as they were gathered. He also shows that during the year A. D. 1885, and up to October 1st of said year, that he continued — make diligent search for said cattle upon that and the adjoining ranges, and he only found and gathered, in addition to those collected, gathered, counted, and numbered in 1884, forty-six head of said cattle; and he would show that the said twenty-eight hundred and sixty-four head of cattle constituted and was all of the cattle owned by said defendant company in said brands and existing on said 29th day of December, 1883, save and except about fifty-seven head which died during the winter of 1883 and 1884, and which constituted the winter loss.

Plaintiff further shows that, to wit, February 7th, 1885, this plaintiff having gathered and collected the said twenty-eight hundred and eighteen head of said cattle, and this plaintiff having re-

tained and held back a portion of the purchase-money for the ranche cattle and purchased from said def't Co., to wit, the sum of about thirty thousand dollars, the said defendant company did then and there agree and promise plaintiff that if he would pay to the defendant company in advance the purchase-money so withheld by him that the said defendant company would make, execute, and deliver to plaintiff its bond, with good and sufficient sureties, in the sum of eighteen thousand dollars, obligating and binding said defendant company to deliver to the plaintiff a sufficient number of cattle to make up any deficiency in said thirty-seven hundred head of cattle, in accordance with said contract or agreement theretofore made by and between said parties on or before the 1st day of October, 1885, or to pay plaintiff all damages, costs, charges, and expenses which plaintiff might sustain by reason of the failure upon the part of the defendant company to deliver said cattle as aforesaid; that thereupon and in consideration thereof plaintiff did pay to the defendant company, in advance, the balance of the purchase-money for said thirty-seven hundred head so as aforesaid withheld by him; and thereupon and in consideration thereof the said defendant company did make, execute, and deliver to plaintiff its said bond or writing obligatory, with said defendants, Frank Houston, John H. Belcher, and E. T. Morris, as securities, in the sum of eighteen thousand dollars, for the full and faithful performance by said defendant company of the contract or agreement aforesaid; which said bond or writing obligatory, bearing date said 7th day of February, 1885, is attached to plaintiff's original petition and made part thereof, marked Exhibit "A," and which is here referred to and made part of this amended petition.

6

Plaintiff shows that he has only been able to find, gather, and collect twenty-eight hundred and sixty-four head of said cattle, which, with the said fifty-seven head lost during said winter of 1883 and 1884 as aforesaid, constituted and was all of the said cattle in said brands bargained and sold by said defendant company to plaintiff and which existed on said December 29th, 1883, leaving a deficiency in the number of said cattle so purchased by him from said defendant company of seven hundred and seventy-nine head of cattle.

7

Plaintiff further shows that the reasonable and natural increase of said seven hundred and seventy-nine head of cattle, which the defendant ought to have delivered to him and which it failed to do, from the 29th day of December, 1883, to October 1st, 1885, the time in which said defendant company was under the said contract or agreement to deliver the whole of said thirty-seven hundred head of cattle to plaintiff, together with the natural increase thereof from said December 29th, 1883, was and would have been about six hundred head of cattle, which plaintiff would show makes the total deficiency of cattle which the said defendant company failed and refused to deliver, as it was bound to do by its said agreement and said bond, of thirteen hundred and eighty head of cattle, and that the highest market value of said cattle since said 1st day of October,

1885, is & was twenty-five dollars per head, and of the aggregate value of thirty-four thousand five hundred ($34,500.00) dollars.

Plaintiff shows that said defendant company has hitherto and still fails and refuses to deliver to him said thirteen hundred and eighty head of cattle or any part thereof, though the same has often been demanded of said company, whereby and by reason of said failure plaintiff has been damaged in said sum of thirty-four thousand five hundred dollars.

8 Plaintiff further shows that there has been no arbitration or judgment in the premises.

Plaintiff further shows that by reason of the default and failure of said defendant company, as hereinbefore fully stated, the conditions of the said bond or writing obligatory have been broken and a cause of action has accrued to plaintiff thereon; and said defendants have wholly failed and refused to pay to the plaintiff his said damages or any part thereof, although often requested so to do.

The premises considered, plaintiff prays as in his original petition; also for judgment against said defendants, The Red River Cattle Company of Texas, Frank Houston, John H. Belcher, and E. T. Morris, for the sum of eighteen thousand dollars, with interest thereon from October 1st, 1885, at the rate of eight per cent. per annum, and against the said Red River Cattle Company of Texas for the said sum of thirty-four thousand & five hundred dollars, with interest thereon from said October 1st, 1885, and for costs and general relief, &c.

G. A. BROWN, WATTS & WOOD,
Att'ys for Pl'ff, Alfred Sully.

(Endorsed:) No. 900. Alfred Sully *vs.* The Red River Cattle Company of Texas *et al.* 1st amended original petition. Filed Feb'y 21, 1887. A. J. Houston, clerk. G. A. Brown, Watts & Wood.

9 *D'f'ts' Amended Answer.*

In the United States Circuit Court for the Northern District of Texas, at Dallas, Tex.

ALFRED SULLY
vs.
RED RIVER CATTLE CO. OF TEXAS *et al.* } No. 900.

Now come the defendants and by leave of the court amend their original answer, filed herein on the 6th day of Jan'y, 1886, so as to read as follows:

1st. The defendants deny each allegation in plaintiff's petition, and of this they put themselves upon the country and pray to be discharged with their costs.

DAVIS & GARNETT &
H. E. ELDRIDGE,
Att'ys for all the Defendants.

2nd. The defendant, The Red River Cattle Company of Texas, alleges that on the 29th day of December, 1883, this defendant owned in the pasture and range mentioned in plaintiff's petition and in the brands therein described at least forty-one hundred head of cattle, which cattle, with the exception of the winter loss, occurring after said 29th day of December, 1883, could have been gathered and counted by the plaintiff by the use of the diligence provided for in said contract of sale and bond, but that the plaintiff, designing and intending to defraud this defendant, failed to use ordinary diligence in gathering and counting said cattle, and did negligently fail to gather and count many of the same, and did wrongfully fail to tally, brand, and account for many of said cattle that were,
10 in fact, gathered and appropriated by plaintiff, and that the winter loss among said cattle for the winter of 1883 and 1884, occurring after the 29th day of December, 1883, was, at least, 25 per cent., and that the plaintiff has never paid this defendant for any of said cattle except for thirty-seven hundred head, when, inclusive of said winter loss, he should have paid this defendant for forty-one hundred head. Wherefore, by reason of the premises, plaintiff is indebted to this defendant in the sum of nine thousand dollars, besides interest, which sum defendant pleads and prays judgment against the plaintiff for the same.

DAVIS & GARNETT &
H. E. ELDRIDGE,
Att'ys for Defendant-.

(Endorsed:) No. 900. Alfred Sully *vs.* The Red River Cattle Company of Texas *et al.* 1st amended original answer. Filed Feb'y 9, 1888. A. J. Houston, clerk.

Judgment.

ALFRED SULLY
vs.
THE RED RIVER CATTLE CO. OF TEXAS *et al.* } 900.

This day came the plaintiff and defendants, by their attorneys, and announced themselves ready for trial, and thereupon came a jury of good and lawful men, to wit, H. S. Evvay, James Proffitt, D. McKay, T. C. Halsell, Frank Moore, W. A. Blackwell, J. F. Metcalf, C. M. Wheat, C. W. McCarty, G. W. Louden, J. M. Lloyd, and W. F. Hancock, who, after being duly empanneled and sworn, and after hearing the evidence, argument of counsel, and charge of the court, returned into open court the following verdict:

11 "We, the jury, find for the plaintiff in the sum of eighteen thousand eight hundred and ten dollars, with int., at 8%, from October 1st, 1885, to date; am't of int., $3,573.90, making a total of $22,383.90, of which $18,000 and int., $3,420, is *vs.* the bondsmen, and $810 and int., $153.90, is *vs.* the R. R. Cattle Co.

(Signed) H. S. EVVAY, *Foreman.*"

And the plaintiff having now here filed and entered a remitter in this case, in and by which he remits the eight hundred and ten dollars. principal, and one hundred and fifty-three and $\frac{90}{100}$ dollars, interest, found by the verdict against the defendants, The Red River Cattle Company of Texas only, and also remits the further sum of four thousand thirty-six and $\frac{10}{100}$ dollars of the amount found by the verdict against the defendants, The Red River Cattle Company of Texas, Frank Houston, John H. Belcher, and E. T. Morris: It is therefore considered by the court that the plaintiff, Alfred Sully, do have and recover of and from the said defendants, The Red River Cattle Company of Texas, as principal, and the defendants, Frank Houston, John H. Belcher, and E. T. Morris, as sureties, the sum of seventeen thousand three hundred and eighty-three and $\frac{90}{100}$ dollars, with interest thereon from this date at the rate of eight per cent. per annum, together with his costs in this behalf expended, and that he have his execution. It is further considered by the court that execution issue in favor of the officers of this court against each party for the costs respectively incurred by them.

12 *Motion for New Trial.*

Suit Pending in the United States Circuit Court for the Northern District of Texas, at Dallas, Texas.

ALFRED SULLY *vs.* RED RIVER CATTLE CO. OF TEXAS *et al.*

Now come the defendants and move the court to grant a new trial, because:

1. The jury mistook the issue and did not add to the cattle already counted and tallied the winter loss of 1883 & '4 occurring after December 29th, 1883, in order to ascertain the shortage, if any.

2. The verdict of the jury is excessive, and shows that no deduction was made for the winter loss of 1883 & '4 occurring after Dec. 29th, 1883.

3rd. The verdict is erroneous, as under it no judgment can be rendered against the Red River Cattle Co. of Texas, who is the principal, for the amount found against the sureties or bondsmen.

4th. The court erred in excluding the evidence of S. S. Maddox, as shown in def'ts' bill of exception No. —.

5th. The court erred in excluding the evidence offered to prove the winter loss of cattle for the winter of 1884 & '5, as shown in def'ts' bill of exception No. —, as the cattle not gathered in 1884 were at plaintiff's risk and the winter loss among them should have been charged to the pl'ff.

6th. The verdict is erroneous and not supported by the evidence, because the contract and petition shows that pl'ff was to gather the cattle, while the proof shows he sold the cattle before gathered and trusted to his men to gather them.

13 7th. Court erred in excluding the evidence of E. F. Ikard, Dr. Childers, and others concerning the winter losses on cattle for the winter of 1883 & '4, coupled with the proof proposed

to be made by them that the country in Texas which came under their observation was similar in climate, range, and other conditions to the Pan Handle, except the Pan Handle was much colder and the winter much more severe, as shown in def'ts' bill of exception No. —.

8th. The charge of the court was indefinite and calculated to mislead, and did not plainly state that if there were thirty-seven hundred head of cattle in the stock on the 29th of December, 1883, the jury should find for the defendant, as the cattle after that time were at the plaintiff's risk and the winter loss should fall on him.

9th. The court erred in admitting the evidence of J. W. Sacra as to statements made by his foreman, as shown in defendants' bill of exception No. —.

10th. The court erred in not permitting the defendants to introduce the evidence of Tobe Odum before the argument was commenced, as shown in defendants' bill of exception No. —.

11th. The defendants ask for a new trial on account of the evidence of Tobe Odum, which they did not discover until after the evidence had been closed and too late to be admitted upon the trial under the rulings of the court, and on account of the evidence of H. H. Campbell and Charles Goodnight, which defendants did not discover until after the verdict was rendered in this cause.

14 12. The court in telling the jury that there was no evidence to support defendants' plea in reconvention, because more than 3,700 head of cattle had not been converted, placed a wrong construction upon the contract, for if the def'ts' right to recover for the excess of 3,700 head depended on pl'ff's count, then the def'ts' right would be defeated by a negligent or imperfect count or a total failure to count by the default of pl'ff.

13. The verdict is excessive in finding against the sureties more than the amount of the bond, which bond does not bear interest.

14th. The verdict will not support any judgment permitted by law or anything but a separate judgment against one and a joint judgment against the others.

DAVIS & GARNETT &
H. E. ELDRIDGE,
Att'ys for Defendants.

ALFRED SULLY *vs.* RED RIVER CATTLE CO. OF TEXAS *et al.*

I, C. W. McCarty, one of the jury in this cause, on oath say that in considering the above cause the jury made no allowance for the winter loss occurring after Dec. 29th, 1883. About four of us contended that the winter loss should be allowed the def'ts, but were overruled by the majority, who contended that the bond was the total consideration, and made no provision for winter loss, and therefore it should not be allowed. The jurors all seemed to believe that there had been considerable winter loss—at least an average of 10 per cent.

(Signed) C. W. McCARTY.

Sworn to and subscribed before me this 16th day of February, 1888.

A. J. HOUSTON,
Clerk U. S. Cir. Court, at Dallas,
(Signed) By JAS. D. ADAMS, *Deputy.*

15 ALFRED SULLY *vs.* RED RIVER CATTLE Co. *et al.*

I, H. H. Campbell, on oath say I have been engaged in the stock business in Texas for 25 years, and for 8 years have had charge of the Matador ranch, in Motley, Cattle, Floyd, and Dickens counties, which company commenced with 60,000 cattle and now have upward of 100,000 cattle, and during all of said time I have been on said ranch and travelled over the country, and during said time I have, after the winter and spring months of every year, been through Donley and adjoining counties and looked into the condition of the cattle and noticed for dead cattle. In my judgment, that part of Donley county embraced in and contained in Red River Cattle Co.'s range is not a good winter range for cattle, and the winter loss is as great there as in any other part of the Pan Handle. In the spring of 1885 I was in Donley county, and passed along McClelland creek and its tributaries, and the stream was full of dead cattle, and there was not a hold but that had from 3 to 15 dead cattle in it. My horse would not drink at the creek on account of the dead cattle. It is my opinion that the winter loss of 1884 and '5 would not be less than 30 per cent. if the other streams in that section contained a like number of dead cattle. In gathering a herd of cattle on an open range it requires good work to gather 60 per cent. the first year, and within 10 or 15 per cent. of the whole the next year. The stock-raisers in the Pan Handle have recently ascertained
16 by actually counting herds that we have heretofore been estimating our winter losses too low, and that they have been much greater than we estimated them at.

(Signed) H. H. CAMPBELL.

STATE OF TEXAS, *County of Dallas:*

Before me, H. P. Lawther, a notary public in and for said State and county, on this day personally appeared H. H. Campbell, who, being by me duly sworn, upon his oath says that the matters and things contained in the above statement are true, and thereupon subscribed the same.

Given under my hand and seal this the 15th day of February, A. D. 1888.

[SEAL.] (Signed) H. P. LAWTHER,
Notary Public, Dallas County, Texas.

I, Tobe Adum, a resident of Dallas Co., Texas, on oath say that, from the summer of 1881 to the summer of 1886, I had a stock of cattle on a range adjoining that sold by the Red River Cattle Co. to Alfred Sully, and afterwards constituting a part of the range of the Clarendon Land and Cattle Company, controlled by L. H. Conhurt;

that I placed on said range during the summer of 1882 2,200 head of stock cattle, and in the summer of 1883 I placed on said range 1,200 more stock cattle, making in all 3,400 head. I watched and tended these cattle as well as stockmen usually do in that section; branded the increase, and from year to year sold only the
17 beeves, and in the summer of 1885 I carefully gathered said cattle, and could find only 1,000 head, when, if said cattle had not died, I should have found a great many more cattle than I placed on said range.

My losses during the winter of 1882 and 1883 were very light, but after that they were always very heavy, much exceeding the natural increase of the cattle, and my cattle were as well situated as to water, grass, and winter protection as the cattle of the Red River Cattle Co. During the summer of 1884 I placed upon said range 4,957 stock cattle, and all died during the winter of 1884 & '5 except about 300.

In my judgment, the winter loss of 1883 & '4 on range cattle in Donley county was not less than 25 per cent. It has — or was common to nearly all cowmen in the Pan Handle to estimate their losses too low, and within the last year or two they have by actually counting their herds ascertained that their losses have been much greater than estimates heretofore made.

(Signed) TOBE ODEM.

Sworn to and subscribed before me on this 16th day of February, 1888.

(Signed) A. J. HOUSTON, *Clerk.*

I, S. S. Maddox, a resident of Wichita county, Texas, on oath say that ever since 1882 I have been representing commission houses in Chicago, Ills., who advanced money to Texas cattlemen on the faith of their cattle and cattle shipments, and it was a part of my duty to ascertain and report to said commission houses the
18 condition of cattle in Northwest Texas and the Pan Handle country, and among our customers was Tobe Odum, J. F. Evans, Thurman, and several other cattlemen with ranches in the Pan Handle, and during the said time I was particular to ascertain the winter loss among cattle, and in order to do so I made trips over the country and made diligent enquiry of stockmen in said section.

The range during the winter of 1883 & '4 was poor on account of the late rains and the grass being frosted while full of sap, and cattle wintered badly, and the winter loss was heavy, and during said time I made enquiry of various stockmen *men* in the Pan Handle and Northwest Texas, and the winter loss of 1883 & '4 was estimated by them at 20 per cent., and I am of the opinion that the winter loss on range cattle in Texas, west of Wichita Falls, for the winter of 1883 & '4, was, at least, 20 per cent.

Upon the trial of this cause I would have testified to the above facts while on the stand if I had been permitted to do so. I have always found that it was the disposition of cattlemen to estimate

their losses below what they really were and I know of *knew of* no instance where a herd of cattle have been counted but that the losses proved to be greater than they have been estimated at.

(Signed) S. S. MADDOX.

Sworn to and subscribed before me on this 16th day of February, 1888.

A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas, Texas,
By JAS. D. ADAMS, *Deputy.*

19 I, W. O. Davis, — oath say that since the trial of this suit I have had a conversation with H. H. Campbell, the manager of the Matador ranch, in which the said Campbell stated that within the last few months Charles Goodnight, pl'ff'- witness, told him that he, Goodnight, and the other stockmen of the Pan Handle had heretofore been estimating their winter losses much too low; that it was proving to be much greater than they had supposed, and that he, Goodnight, had ascertained by count that he had lost 18,000 head of cattle, but when I requested Mr. Campbell to make affidavit to that effect he declined because he and Goodnight were friends and the conversation between him and Goodnight was of a somewhat confidential nature.

(Signed) W. O. DAVIS.

Sworn to and subscribed before me on this 16th day of Feb'y, 1888.

A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas,
(Signed) By JAS. D. ADAMS, *Deputy.*

ALFRED SULLY *vs.* RED RIVER CATTLE CO. OF TEXAS *et al.*

I, John H. Belcher, one of the defendants in the above cause, do solemnly swear that neither I nor any of the other defendants in this cause knew of the evidence of Tobe Odum before the evidence in this cause was closed, and did not know of the evidence of H. H. Campbell and Charles Goodnight until after the verdict was rendered in this cause; that he cannot procure an affidavit of the evidence of Charles Goodnight at this term of the court because
20 he resides in Paladuro, in Armstrong county, Texas, a distance of 300 to 400 miles from Dallas.

(Signed) JNO. H. BELCHER.

Sworn to and subscribed before me on this 16th day of February, 1888.

A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas, Texas,
(Signed) By JAS. D. ADAMS, *Deputy.*

(Endorsed:) No. 900. Alfred Sully *vs.* The Red River Cattle Co. of Texas *et al.* Defendants' motion for a new trial. Filed Feb'y 16, 1888. A. J. Houston, clerk.

Judgment Overruling Motion for New Trial.

ALFRED SULLY
vs.
THE RED RIVER CATTLE COMPANY OF TEXAS *et al.* } 900.

This day came on to be heard the defendants' motion for new trial in the above styled and numbered cause, and the same having been heard and understood by the court, it is of the opinion that the law is against said motion. It is therefore considered by the court that defendants' motion for new trial be, and the same is hereby, overruled, and that the defendants pay the costs of this motion; to which ruling of the court the defendants except.

Bill of Exception.

In the Circuit Court for the Northern District of Texas, at Dallas, Texas.

ALFRED SULLY
vs.
RED RIVER CATTLE COMPANY OF TEXAS *et al.* } No. 900.

1st. Be it remembered that at a term of the United States circuit court for the northern district of Texas, at Dallas, Texas, comencing on the second Monday in January, 1888, the above cause was
21 regularly reached for trial, and the parties having announced ready and a jury being empannelled and the plaintiff having introduced in evidence the sale bill attached as an exhibit to his petition and the bond from the defendants to the plaintiff, dated February 7th, 1885, as follows:

Bond.

Know all men by these presents that we, The Red River Cattle Company of Texas, a corporation duly created, organized, and existing under and by virtue of the laws of the State of Texas, and Frank Houston, of the city of Terrell, in the county of Kaufman, in the State of Texas, and John H. Belcher and E. T. Morris, of the city of Gainesville, in the county of Cooke, in the State of Texas, are held and firmly bound unto Alfred Sully, of the city, county, and State of New York, in the sum of eighteen thousand dollars, good and lawful money of the United States, to be paid to the said Alfred Sully, his heirs, executors, administrators, or assigns; for which payment, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the seventh day of February, A. D. one thousand eight hundred and eighty-five. Whereas The Red River Cattle Company of Texas bargained and sold to said Alfred Sully all that certain stock of cattle belonging to said company situated and running on the range and pasture of

said company in Gray and Donley counties, in said State of Texas, at the sum or price of twenty-two dollars and fifty cents per head on the twenty-ninth day of December, A. D. 1883; and whereas said company have guaranteed unto said Sully, his heirs, executors, administrators, and assigns, that there were three thousand
22 seven hundred head of cattle belonging to it in said stock running on said range and in said pasture on said last-mentioned day, and that in the event there were not said number of three thousand seven hundred cattle on said range and in said pasture owned by said company, free from all encumbrance to its title to the same, on said day and date to deliver to said Alfred Sully, his heirs, executors, administrators, or assigns, in said pasture a sufficient number of the same kind of cattle to make up such deficiency, and to deliver to him or them such cattle of such ages as to give and secure to him or them the benefit of the growth and natural increase of said cattle since said twenty-ninth day of December, A. D. 1883:

Now, the condition of the above obligation is such that if the above-bounden The Red River Cattle Company of Texas shall deliver to said Alfred Sully, his heirs, executors, administrators, or assigns, such cattle sufficient to make up such deficiency, if any, in accordance with said agreement, on or before the first day of October, 1885, or pay him or them all damages, costs, charges, and expenses he or they may sustain on account of failing to deliver said cattle as aforesaid, and shall abide by and fully perform and conform to the estimate, decision or decisions, award or awards, of any arbitrator or arbitrators chosen by agreement of the said The Red River Cattle Company of Texas and the said Alfred Sully or assigns, or the order or judgment of any court of competent jurisdiction in the premises or touching or concerning the matters aforesaid or any of them,
23 then this obligation is to be void; otherwise to remain in full force and effect.

In testimony whereof the said The Red River Cattle Company of Texas has caused its corporate seal to be hereunto affixed and these presents to be subscribed by its president and secretary, and the said Frank Houston and John H. Belcher and E. T. Morris have hereunto subscribed their names and affixed their seals this seventh day of February, A. D. 1885.

THE RED RIVER CATTLE COMPANY OF TEXAS,

[SEAL.] By FRANK HOUSTON, *Its President.*

Attest: W. R. BOURLAND, *Secretary.*

FRANK HOUSTON. [SEAL.]

JNO. H. BELCHER. [SEAL.]

E. T. MORRIS. [SEAL.]

Sealed and delivered in presence of—

H. E. ELDRIDGE.

W. A. LEDBETTER.

THE STATE OF TEXAS, }
County of ——, } *ss:*

Frank Houston, being duly sworn, says that he resides at Terrell, in the county of Kaufman, in said State of Texas, and is a freeholder within said State of Texas, and is worth the sum specified in the above bond over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

FRANK HOUSTON.

Subscribed and sworn to before me, at Gainesville, in said State of Texas, this 9th day of February, 1885.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke Co., Texas.

24 STATE OF TEXAS, }
County of Cooke, } *ss:*

I, H. E. Eldridge, residing at Gainesville, in the county of Cooke and State of Texas, a notary public in and for the county of Cooke and State of Texas aforesaid, duly commissioned and sworn, do hereby certify that on the ninth day of February, one thousand eight hundred and eighty-five, at Gainesville, in said county of Cooke and State of Texas, before me personally appeared Frank Houston, known to me to be the person who signed the foregoing affidavit, and made solemn oath to the truth of the same as therein set forth, and that the said affidavit was then and there subscribed and taken before me.

In witness whereof I have hereunto set my hand and official seal, at Gainesville aforesaid, this ninth day of February, one thousand eight hundred and eighty-five.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke County, Texas.

STATE OF TEXAS, }
County of Cooke, } *ss:*

I, A. J. Thompson, clerk of the county of Cooke and of the county court within and for said county, which is a court of record, and keeper of the seal thereof, do hereby certify that H. E. Eldridge, Esq., whose name is subscribed to the jurat of the annexed affidavit, was at the time of taking such affidavit a notary public within and for said county of Cooke, duly commissioned and sworn, and duly authorized by the laws of Texas to administer oaths and take
25 affidavits and depositions and to take and certify the acknowledgement and proof of deeds to be recorded in said State of Texas, and that I am well acquainted with the handwriting of said H. E. Eldridge, and verily believe that the signature to said affidavit is genuine and his signature.

In witness whereof I have hereunto affixed my hand and official seal this eleventh day of February, one thousand eight hundred and eighty-five.

(Signed) A. J. THOMPSON,
[SEAL.] *County Clerk of Cooke County, Texas, and Clerk of the County Court of said Cooke County, Texas.*

THE STATE OF TEXAS, } ss:
County of Cooke, }

John H. Belcher, being duly sworn, says that he resides at the city of Gainesville, in the county of Cooke, in the State of Texas, and is a freeholder within said State of Texas, and is worth the sum specified in the above bond over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

JNO. A. BELCHER.

Sworn to and subscribed before me, at Gainesville, in said State of Texas, this 7th day of February, A. D. 1885.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke County, Texas.

STATE OF TEXAS, } ss:
County of Cooke, }

I, H. E. Eldridge, residing at Gainesville, in the county of Cooke and State of Texas, a notary public in and for the county of Cooke and State of Texas aforesaid, duly commissioned and sworn, do hereby certify that on the seventh day of February, one
26 thousand eight hundred and eighty-five, at Gainesville, in said county of Cooke and State of Texas, before me personally appeared John H. Belcher, known to me to be the person who signed the foregoing affidavit, and made solemn oath to the truth of the same, as therein set forth, and that the said affidavit was then and there subscribed and taken before me.

In witness whereof I have hereunto set my hand and official seal, at Gainesville aforesaid, this seventh day of February, one thousand eight hundred and eighty-five.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke County, Texas.

STATE OF TEXAS, } ss:
County of Cooke, }

I, A. J. Thompson, clerk of the county of Cooke and of the county court within and for said county, which is a court of record, and keeper of the seal thereof, do hereby certify that H. E. Eldridge, Esq., whose name is subscribed to the jurat of the annexed affidavit, was at the time of taking such affidavit a notary public within and for said county of Cooke, duly commissioned and sworn, and duly au-

thorized by the laws of Texas to administer oaths and take affidavits and depositions and to take and certify the acknowledgement and proof of deeds to be recorded in said State of Texas, and that I am well acquainted with the handwriting of said H. E. Eldridge and verily believe that the signature to said affidavit is genuine and his signature.

In witness whereof I have hereunto affixed my hand and official seal this eleventh day of February, one thousand eight hundred and eighty-five.

A. J. THOMPSON,

27 [SEAL.] *County Clerk of Cooke County, Texas, and Clerk of the County Court of said Cooke County, Texas.*

THE STATE OF TEXAS, } ss:
County of Cooke, }

E. T. Morris, being duly sworn, says that he resides at Gainesville, in the county of Cooke, in said State of Texas, and is a freeholder within said State of Texas, and is worth the sum specified in the above bond over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

E. T. MORRIS.

Subscribed and sworn to before me, at Gainesville, in said State of Texas, this 11th day of February, 1885.

[SEAL.] H. E. ELDRIGE,
Notary Public, Cooke Co., Texas.

STATE OF TEXAS, } ss:
County of Cooke, }

I, H. E. Eldridge, residing at Gainesville, in the county of Cooke and State of Texas, a notary public in and for the county of Cooke and State of Texas aforesaid, duly commissioned and sworn, do hereby certify that on the eleventh day of February, one thousand eight hundred and eighty-five, at Gainesville, in said county of Cooke and State of Texas, before me personally appeared E. T. Morris, known to me to be the person who signed the foregoing affidavit, and made solemn oath to the truth of the same as therein set forth, and that the said affidavit was then and there subscribed and taken before me.

In witness whereof I have hereunto set my hand and offi-
28 cial seal, at Gainesville aforesaid, this eleventh day of February, one thousand eight hundred and eighty-five.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke County, Texas.

STATE OF TEXAS, } ss:
County of Cooke, }

I, A. J. Thompson, clerk of the county of Cooke and of the county court within and for said county, which is a court of record, and keeper of the seal thereof, do hereby certify that H. E. Eldridge, Esq., whose name is subscribed to the jurat of the annexed affidavit, was at the time of taking such affidavit a notary public within and for said county of Cooke, duly commissioned and sworn, and duly authorized by the laws of Texas to administer oaths and take affidavits and depositions and to take and certify the acknowledgement and proof of deeds to be recorded in said State of Texas, and that I am well acquainted with the handwriting of said H. E. Eldridge and verily believe that the signature to said affidavit is genuine and his signature.

In witness whereof I have hereunto affixed my hand and official seal this eleventh day of February, one thousand eight hundred and eighty-five.

A. J. THOMPSON,
[SEAL.] *County Clerk of Cooke County, Texas, and Clerk of the County Court of said Cooke County, Texas.*

THE STATE OF TEXAS, } ss:
County of Cooke, }

On this ninth day of February, A. D. 1885, before me, H.
29 E. Eldridge, a notary public in and for the county of Cooke and State of Texas, personally appeared W. R. Bourland, who, being by me duly sworn, says that he resides at Gainesville, in said State of Texas; that he is the secretary of the Red River Cattle Company of Texas; that he knows the corporate seal of said corporation; that the seal affixed to the within instrument is such corporate seal; that it was thereto affixed by order of the board of directors of said corporation, and that deponent signed his name thereto as secretary as aforesaid by the like order; and on the same day before me personally came The Red River Cattle Company of Texas, by its president, Frank Houston, known to me to be the person whose name is subscribed to the said instrument as president thereof, and he, the said Frank Houston, acknowledged the same to be the act and deed of said corporation, and that he executed the same for the purposes and consideration therein expressed.

W. R. BOURLAND.

Given under my hand and seal of office this ninth day of February, A. D. 1885.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke County, Texas.

STATE OF TEXAS, } ss:
County of Cooke, }

I, H. E. Eldridge, residing at Gainesville, in the county of Cooke and State of Texas, a notary public in and for the county of Cooke and State of Texas aforesaid, duly commissioned and sworn, do hereby certify that on the ninth day of February, one thousand eight hundred and eighty-five, at Gainesville, in said county of Cooke and State of Texas, before me personally appeared W. R. Bour-
30 land, known to me to be the person who signed the foregoing affidavit and acknowledgement, and made solemn oath to the truth of the same as therein set forth, and that the said affidavit was then and there subscribed and taken before me.

In witness whereof I have hereunto set my hand and official seal, at Gainesville aforesaid, this ninth day of February, one thousand eight hundred and eighty-five.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke County, Texas.

STATE OF TEXAS, } ss:
County of Cooke, }

I, A. J. Thompson, clerk of the county of Cooke and of the county court within and for said county, which is a court of record, and keeper of the seal thereof, do hereby certify that H. E. Eldridge, Esq., whose name is subscribed to the affidavit and certificate of acknowledgement of the annexed instrument, was at the time of taking such affidavit and acknowledgement a notary public within and for said county of Cooke, duly commissioned and sworn, and duly authorized by the laws of the State of Texas to administer oaths and take affidavits and depositions and to take and certify the acknowledgement and proof of deeds to be recorded in said State of Texas, and that I am well acquainted with the handwriting of said H. E. Eldridge and verily believe that the signature to said affidavit and certificate of acknowledgement is genuine and his signature.

In witness whereof I have hereunto affixed my hand and official seal this eleventh day of February, one thousand eight hundred and eighty-five.

[SEAL.] A. J. THOMPSON,
County Clerk of Cooke County, Texas, and
Clerk of the County Court of said Cooke County, Texas.

31 THE STATE OF TEXAS, } ss:
County of Cooke, }

On this ninth day of February, one thousand eight hundred and eighty-five, before me, a notary public in and for the county of Cooke and State of Texas, personally appeared Frank Houston, known to me to be one of the persons described in and who executed the within instrument and whose name is subscribed thereto, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal, at Gainesville, in said State of Texas, the day and year last aforesaid.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke County, Texas.

STATE OF TEXAS, } ss:
County of Cooke, }

I, A. J. Thompson, clerk of the county of Cooke and of the county court within and for said county, which is a court of record, and keeper of the seal thereof, do hereby certify that H. E. Eldridge, Esq., whose name is subscribed to the certificate of acknowledgement of the annexed instrument, was at the time of taking such acknowledgement a notary public within and for said county of Cooke, duly commissioned and sworn, and duly authorized by the laws of the State of Texas to administer oaths and take affidavits and depositions and to take and certify the acknowledgement and proof of deeds to be recorded in said State of Texas, and that I am well acquainted with the handwriting of said H. E. Eldridge and verily believe that the signature to said certificate of acknowledge-
32 ment is genuine and his signature.

In witness whereof I have hereunto affixed my hand and official seal this eleventh day of February, one thousand eight hundred and eighty-five.

A. J. THOMPSON,
[SEAL.] *County Clerk of Cooke County, Texas, and Clerk of the County Court of said Cooke County, Texas.*

THE STATE OF TEXAS, } ss:
County of Cooke, }

On this seventh day of February, one thousand eight hundred and eighty-five, before me, a notary public in and for the county of Cooke and State of Texas, personally appeared John H. Belcher, known to me to be one of the persons described in and who executed the within instrument and whose name is subscribed thereto, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal, at Gainesville, in said State of Texas, the day and year last aforesaid.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke County, Texas.

STATE OF TEXAS, } ss:
County of Cooke, }

I, A. J. Thompson, clerk of the county of Cooke and of the county court within and for said county, which is a court of record, and keeper of the seal thereof, do hereby certify that H. E. Eldridge, Esq., whose name is subscribed to the certificate of acknowledgement

of the annexed instrument, was at the time of taking such acknowledgement a notary public within and for said county of Cooke, duly commissioned and sworn, and duly authorized by the laws of
33 the State of Texas to administer oaths and take affidavits and depositions and to take and certify the acknowledgement and proof of deeds to be recorded in said State of Texas, and that I am well acquainted with the handwriting of said H. E. Eldridge and verily believe that the signature to said certificate of acknowledgement is genuine and his signature.

In witness whereof I have hereunto affixed my hand and official seal this eleventh day of February, one thousand eight hundred and eighty-five.

A. J. THOMPSON,
[SEAL.] *County Clerk of Cooke County, Texas, and Clerk of the County Court of said Cooke County, Texas.*

THE STATE OF TEXAS, } ss:
County of Cooke, }

On this eleventh day of February, one thousand eight hundred and eighty-five, before me, a notary public in and for the county of Cooke and State of Texas, personally appeared E. T. Morris, known to me to be one of the persons described in and who executed the within instrument and whose name is subscribed thereto, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal, at Gainesville, in said State of Texas, the day and year last aforesaid.

[SEAL.] H. E. ELDRIDGE,
Notary Public in and for Cooke County, Texas.

STATE OF TEXAS, } ss:
County of Cooke, }

I, A. J. Thompson, clerk of the county of Cooke and of the
34 county court within and for said county, which is a court of record, and keeper of the seal thereof, do hereby certify that H. E. Eldridge, Esq., whose name is subscribed to the certificate of acknowledgement of the annexed instrument, was at the time of taking such acknowledgement a notary public within and for said county of Cooke, duly commissioned and sworn, and duly authorized by the laws of the State of Texas to administer oaths and take affidavits and depositions and to take and certify the acknowledgement and proof of deeds to be recorded in said State of Texas, and that I am well acquainted with the handwriting of said H. E. Eldridge and verily believe that the signature to said certificate of acknowledgement is genuine and his signature.

In witness whereof I have hereunto affixed my hand and official

seal this 11th day of February, one thousand eight hundred and eighty-five.

A. J. THOMPSON,

[SEAL.] *County Clerk of Cooke County, Texas, and Clerk of the County Court of said Cooke County, Texas.*

35 And the plaintiff having introduced evidence tending to show that from June 1st, 1884, to October 1st, 1885, the cattle embraced in said sale bill were diligently gathered by this vendee, the Clarendon Land and Cattle Company, both on said range and pasture and for a distance of one hundred and fifty miles in every direction therefrom, and that only twenty-eight hundred and eighteen were found in 1884 and forty-six in 1885; and the defendants having introduced proof tending to show that in the latter part of the summer of 1882 the Red River Cattle Company of Texas placed on said range thirty-eight hundred stock cattle, in the brands set forth in said sale bill, and branded therefrom, in the summer of 1883, nine hundred calves in the same brand and which were added to said stock, and that none of said stock or calves were ever sold, disposed of, or removed from said range, except four hundred and sixty-three beeves, in the summer of 1883, and that during the winter of 1882 & 1883 said cattle did well and the losses were very slight, and that all of said cattle remained on an open range until the latter part of the summer of 1883, when a portion of them was placed in said pasture and the balance allowed to remain on open range, and that said cattle had never been counted from the time they were placed on said range until the sale to the plaintiff, and that not exceeding sixty per cent. of range cattle could be gathered in one year and during the second year not exceeding thirty per cent., the defendants thereupon proposed to prove, by Doss, Swearingen, and other cattlemen of the Texas Pan Handle country competent

36 to judge, that the winter loss on range cattle in Donley, Gray, and adjoining counties for the winter of 1884–'5 was at least forty per cent., the proof having already shown that the winter loss on range cattle always occurs after December 29th; but the above evidence of said Swearingen and others was objected to by the plaintiff and excluded by the court upon the ground that under said sale bill and bond the winter loss of the ungathered portion of said cattle for the winter of 1884 was the loss of the Red River Cattle Company of Texas and not of the plaintiff; to which ruling the defendants excepted.

2. And the plaintiff upon said trial introduced the deposition of J. W. Sacra, who testified that Sacra, Sugg & Bro., of which firm witness was a partner, had, during the winter of 1883 and 1884, a stock of range cattle in Donley and Gray counties, on a range adjoining the Red River Cattle Company of Texas, and proposed to prove by said Sacra that in the spring of 1884, he, said Sacra, was at said ranche, and while there his foreman, who had been on the ranche during the winter, informed him that the winter losses of the winter 1883 and 1884 on cattle in the Pan Handle, and especially on their own ranche, had been very light; to the introduction of

which defendants objected, because hearsay; but the objection was overruled by the court; to which defendants excepted.

3. And the defendants during said trial introduced John H. Belcher and E. F. Ikard; and, after proving by them that they had been engaged in the cattle business in Clay, Young, Cooke, and other counties and in the Indian Territory for twenty-five years, and during said time had closely observed the winter losses
37 among range cattle, and that the country which came under their observation was similar in climate, grass, and winter protection to Gray and Donley counties, Texas, except that the winters in Gray and Donley are longer and more severe, and that the winter losses in that part of North Texas with which they were acquainted, during the winter of 1883 and 1884, was at least twenty-five per cent., and that said loss occurred after December 29th, 1883; but said evidence was objected to because said witnesses were not competent to judge of the winter losses in the counties of Gray and Donley; which objection was sustained by the court and said evidence excluded; to which defendants excepted.

4. And during the trial of said cause the plaintiffs introduced the deposition of Charles Goodnight, who had been engaged in the cattle business in Armstrong and other counties in the Texas Pan Handle since 1880, and proposed to prove by him that, while he had no means of estimating the winter loss among range cattle in the Pan Handle for the winter of 1883 & 1884, it was estimated by stockmen in the Pan Handle at two per cent.; to which the defendants objected, because, first, the witness disclosed that he was not competent to judge; second, there was better evidence, namely, the stockmen who made the estimate; but said objections were overruled by the court and said evidence admitted; to which defendants excepted.

5. And defendants, upon the trial of this cause, introduced S. S. Maddox and proposed to prove by him that since the sum-
38 mer of 1882 he has resided in Wichita county, Texas, and has been agent for commission houses in Chicago, Illinois, who advanced money to Texas cattlemen upon the faith of their cattle and cattle shipments, and that — as a part of his duty to investigate and report the condition of cattle in Northwest Texas, including the Pan Handle, to the houses which he represents, and especially the winter losses among cattle, and that among the customers of his house during the years 1883 and 1884 were several cattlemen of Gray and Donley counties, and that during the winter of 1883 and 1884 the witness made diligent inquiry to ascertain the winter losses in said section, and that they were estimated in that portion of Texas west of Wichita county, including Gray and Donley counties, at twenty per cent., and that in the opinion of the witness the winter losses in said section in the winter of 1883 and 1884 were at least twenty per cent. But said evidence was objected to by plaintiff because said witness was not competent to judge of the winter losses in Gray and Donley counties; which objection was sustained by the court and said evidence excluded; to which defendants excepted.

6. And the defendants introduced evidence tending to show that the winter loss of 1883 and 1884 occurred after December 29th, and

that such loss ranged from six to forty per cent., and that after December 29th the cattle sold by the Red River Cattle Company to plaintiff were not favorably situated for passing the winter without loss, and that said company branded and turned loose on said range in the summer of 1883, in the brands sold to plaintiff, nine hundred calves, of which only four hundred and eighty-seven
39 were found and counted by plaintiff's vendee during the years 1884 and 1885, and that of the cattle turned loose on said range during the year 1882 there should have been, if there was no loss, two thousand cows in 1884, but that in 1884 and 1885 the plaintiff's vendee only found and counted thirteen hundred and twenty-one, and that the other grades of cattle gathered and counted by plaintiff's vendee during the year 1884 and 1885 fell short the number placed on the range in a similar proportion, and that in the year 1882 the Red River Cattle Company of Texas placed on said range thirty-eight hundred head of stock cattle, which, added to the calves of 1883, would make forty-seven hundred head of cattle, and it only sold or removed from said range four hundred and sixty-three beeves, and that during the winter of 1882 and 1883 the said cattle wintered well and the losses were very light, and that said cattle never had been counted from the time they were placed on the range until they were gathered and counted by the plaintiff's vendee during the years 1884 and *and* 1885. The court directed the jury to disregard the defendant's plea in reconvention, as there was no evidence to support it, the court holding that the right of defendant, The Red River Cattle Company, to recover for any excess in said cattle over thirty-seven hundred head depended upon there being actually found and counted a number of cattle exceeding thirty-seven hundred head.

7. And after the evidence was closed the court proceeded to orally instruct the jury as follows:

40 "The contract sued on by the plaintiff has been read to you in evidence, and is so plain that I do not deem it necessary to construe it, but will leave that to you."

To which the defendants excepted, because it was the duty of the court and not of the jury to construe written contracts.

8th. The proof introduced by the plaintiff upon the trial tended to show that he did not gather and count the cattle purchased of the Red River Cattle Company of Texas, but soon after his purchase and before the cattle were gathered he sold said cattle to the Clarendon Land and Cattle Company, and his said vendee gathered and counted said cattle, the evidence showing that during the greater portion of the count in 1884 the Red River Cattle Company of Texas was represented on the ground by one Hudson, who quit during the fall of 1884 because plaintiff refused to pay him for his services, upon the ground that under the contract the Red River Cattle Co. should pay for such services, and that afterwards said company was not represented or on the ground during said counting or count, and no objection was made to the cattle being gathered and counted by plaintiff's vendee, and upon this subject defendants requested the court to charge the jury as follows:

"Under the contract, at petition it was the duty of the plaintiff to gather and count the cattle purchased of the Red River Cattle Company of Texas, and said duty or right could not be transferred to another; and if the plaintiff had not gathered and counted said cattle he has no right to maintain this suit;" which instruction the court declined to give or any other upon said subject; to
41 which defendants excepted.

9. And after the jury had returned their verdict herein and within one day thereafter the defendants filed their motion for a new trial because, among other things, the verdict was excessive; and upon the hearing of said motion the court announced that, in its opinion, said verdict was excessive and larger than authorized by the evidence, and that unless the plaintiff would remit five thousand dollars of the same he would grant said motion; and thereupon plaintiff entered said remitter, and said motion was overruled; to which defendants objected because if, in the opinion of the court, the verdict was excessive a new trial should have been granted, for there is no standard determining the excess, and after the remitter the verdict is that of the court and not of the jury.

10. And after the return of the verdict in this cause, said verdict being as follows:

"We, the jury, find for the plaintiff in the sum of eighteen thousand eight hundred and ten dollars, with int., at 8 %, from Oct. 1st, 1885, to date; am't of int. $3,573.90, making a total of $22,383.90, of which $18,000 and int., $3,420, is *vs.* the bondsmen and $810 and int., $153.90, is *vs.* the R. R. Cattle Co.

(Signed) H. S. EVVAY, *Foreman.*"

The defendants, within one day thereafter, filed a motion to set aside said verdict and for a new trial herein, because said verdict will not support any judgment against the Red River Cattle Company of Texas for the amount found against the sureties or
42 bondsmen, and because a judgment cannot be rendered against one defendant individually and at the same time against him and the other defendants jointly, and because a judgment cannot be rendered against sureties without rendering judgment at the same — against the principal.

And the defendants submit this their bill of exceptions and ask that the foregoing exceptions be signed and certified and made a part of the record herein, which is accordingly done this 17th day of February, 1888.

(Signed) A. P. McCORMICK,
U. S. Dist. Judge.

(Endorsed:) No. 900. Alfred Sully *vs.* The Red River Cattle Company of Texas *et al.* Def'ts' bill of exception. Filed Feb'y 17, 1888. A. J. Houston, clerk, (sign'd) by Jas. D. Adams, dept'y.

Assignment of Errors.

In the Supreme Court of the United States.

THE RED RIVER CATTLE CO. OF TEXAS *et al.*, Plaintiffs in Error,

vs.

ALFRED SULLY, Defendant in Error.

Now come The Red River Cattle Co. of Texas, John H. Belcher, E. T. Morris, and Frank Houston, plaintiffs in error, and make the following assignment of errors:

First. The court erred in excluding the evidence of Doss, Swearengen, and other cattlemen, of the Texas Pan Handle, competent to judge, that the winter loss on range cattle in Donley, Gray,
43 and adjoining counties, for the winter of 1884–'5, was at least forty per cent., the proof already having shown that the winter loss on range cattle always occurs after December 29th, as shown by the first clause of plaintiffs in error's bill of exception.

Second. The court erred in admitting the evidence of J. W. Sacra, who testified that Sacra, Sugg & Bro., of which firm witness was a member, had, during winter of 1883 & 1884, a stock of range cattle in Donley and Gray counties, Texas, on a range adjoining the Red River Cattle Co.'s range, and that while witness was at said range in spring of 1884 his foreman, who had been on the range during the winter, informed him that the winter losses of the winter of 1883–'4 on cattle in the Pan Handle, and especially on their own ranche, had been very light, because the same was hearsay, as shown by the 2nd clause of the bill of exception.

3d. The court erred in excluding the testimony of John H. Belcher and E. F. Ikard concerning winter losses on cattle in Pan Handle of Texas, as shown in the 3d clause of bill of exception.

4th. The court erred in admitting the evidence of Charles Goodnight concerning winter losses on range cattle in the Pan Handle of Texas, said testimony being hearsay and the witness incompetent, as shown by the 4th clause of bill of exception.

5th. The court erred in excluding testimony of S. S. Mad-
44 dox relative to the winter losses on cattle in Pan Handle of Texas in winter of 1883–'4, as shown by 5th clause of bill of exception.

6th. The court erred in directing the jury to disregard defendants' plea in reconvention, as shown by the 6th clause of bill of exception.

7th. The court erred in its instruction to the jury, as shown by the 7th clause of bill of exception.

8th. The court erred in its instruction to the jury, as shown by 8th clause of bill of exception.

9th. The court erred in refusing to set aside the verdict of the jury because excessive, and instead allowing the defendant in error to remit five thousand dollars of the same, as shown by the 9th clause of bill of exception.

10th. The court erred in refusing to set aside the verdict of the jury and grant a new trial because said verdict will not support any judgment against the Red River Cattle Co. of Texas for the amount found against the sureties and bondsmen, and because a verdict cannot be rendered against one def't individually and also at the same time jointly with other def'ts, and because a judgment cannot be rendered against a surety without rendering judgment at the same time against the principal, as shown by the 10th clause of bill of exception.

SANNIE ROBERTSON,
DAVIS & GARNETT,
H. E. ELDRIDGE,
Att'ys for Plaintiffs in Error.

45 (Endorsed:) No. 900. Assignment of errors. Filed April 10, 1888. A. J. Houston, clerk, (signed) by Jas. D. Adams, deputy.

Petition for Writ of Error.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas, Texas.

ALFRED SULLY
vs.
RED RIVER CATTLE CO. OF TEXAS *et al.* } No. 900.

Now come the defendants, The Red River Cattle Co. of Texas, E. T. Morris, John H. Belcher, and Frank Houston, and respectfully represent to the court that they consider themselves aggrieved by the final judgment rendered in this cause on the sixteenth day of February, 1886, and at the present term of this court, and to correct the manifest errors in said judgment your petitioners pray for a writ of error to be allowed, upon which said judgment may be reviewed and reversed in the Supreme Court of the United States.

DAVIS & GARNETT,
H. E. ELDRIDGE,
Att'ys for Def'ts.

Writ of error allowed this Feb'y 16th, 1888.
(Signed) A. P. McCORMICK,
U. S. Dist. Judge.

(Endorsed:) No. 900. Alfred Sully *vs.* Red River Cattle Co. *et al.* Petition for writ of error. Filed Feb'y 16, 1888. A. J. Houston, clerk, (signed) by Jas. D. Adams, deputy.

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of

the judgment of a plea which is in the said circuit court, before you or some of you, between Alfred Sully, plaintiff, and The Red River Cattle Co. of Texas, Frank Houston, E. T. Morris, and John H. Belcher, defendants, No. 900 on the docket of said court, at Dallas, Texas, a manifest error hath happened, to the great damage of the said Red River Cattle Co. of Texas, Frank Houston, E. T. Morris, and John H. Belcher, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrision R. Waite, Chief Justice of the said Supreme Court, the 24th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON,
Clerk of the Circuit Court of the United States for the Northern District of Texas, at Dallas.

Allowed by—
A. P. McCORMICK,
U. S. Dist. Judge.

[Endorsed:] No. 900. Writ of error. Filed Feb'y 26, 1888. A. J. Houston, clerk. Refiled Feb'y 27, 1888. A. J. Houston, clerk.

47 *Bond for Writ of Error.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas, Texas.

ALFRED SULLY
vs.
RED RIVER CATTLE CO. OF TEXAS *et al.* } No. 900.

Know all men by these presents that we, the Red River Cattle Co. of Texas, Frank Houston, E. T. Morris, John H. Belcher, as principals, and A. S. Belcher, Thos. J. Belcher, and C. W. Easley, as sureties, are held and firmly bound unto Alfred Sully, of the State of New York, in the sum of twenty-four thousand dollars, to be paid to the said Alfred Sully, his executors or administrators; to which payment, well and truly to be paid, we bind ourselves and each of us jointly, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this the 18th day of February, 1888.

Whereas the above-named Red River Cattle Co. of Texas, Frank Houston, E. T. Morris, and John H. Belcher have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Texas, at Dallas, Texas, rendered on the 16th of February, 1888, in favor of the said Alfred Sully against said Red River Cattle Co. of Texas, Frank Houston, E. T. Morris, and John H. Belcher for seventeen thousand three hundred and eighty-three dollars and ninety cents, besides the costs of suit:

Now, therefore, the condition of this obligation is such that
48 if the above-named Red River Cattle Co. of Texas, Frank Houston, E. T. Morris, and John H. Belcher shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed)	THE RED RIVER CATTLE CO. OF TEXAS.	[SEAL.]
(Signed)	E. T. MORRIS.	[SEAL.]
(Signed)	FRANK HOUSTON.	[SEAL.]
(Signed)	JNO. H. BELCHER.	[SEAL.]
(Signed)	A. S. BELCHER.	[SEAL.]
(Signed)	THOS. J. BELCHER.	[SEAL.]
(Signed)	C. W. EASLEY.	[SEAL.]

In U. S. Circuit Court at Dallas, Texas.

ALFRED SULLY
vs.
RED RIVER CATTLE CO. OF TEXAS *et al.* } No. 900.

I, A. S. Belcher, a resident of Montague county, Texas, on oath say that I own land and cattle situated in Cooke and Montague counties, Texas, worth at least the sum of fifty thousand dollars, subject to execution, and that I am worth in my own right over and above debts and exemptions at least the sum of fifty thousand dollars.

(Signed) A. S. BELCHER.

Sworn to and subscribed before me this the 18th day of February, 1888.

[SEAL.] (Signed) H. M. SCHOOLFIELD,
Not'y Pub. for Montague Co., Tex.

I, T. J. Belcher, a resident of Clay county, Texas, on oath say that I am the owner of land and cattle situated in Clay county,
49 Texas, of the value of twenty-five thousand dollars, subject to execution, and that I am worth in my own right at least the

sum of twenty-five thousand dollars over and above all debts and exemptions. The erasures on lines 5 and 8 of the above affidavit of T. J. Belcher were made before signing.

(Signed) THOS. J. BELCHER.

Sworn to & subscribed before me this Feb'y 20th, 1888, and the erasures on lines 5 & 8 were made before signing.

[SEAL.] (Signed) W. B. STICKNEY,
Not'y Pub. for Clay Co., Texas.

ALFRED SULLY
vs.
RED RIVER CATTLE CO. OF TEXAS *et al.* } No. 900.

I, C. W. Easly, a resident citizen of the county of Clay, in the State of Texas, on oath say that I own land and notes in Clay and Wichita counties, Texas, worth at least the sum of twenty-five thousand dollars, subject to execution, and that I am worth in my own right, over and above debts and exemptions, at least the sum of twenty-five thousand dollars.

(Signed) C. W. EASLY.

Sworn to and subscribed before me by C. W. Easly this 23d day of February, 1888.

[SEAL.] (Signed) WM. WANTLAND,
J. P. and ex Officio Notary Public, Clay County, Texas.

The writ of error bond hereto attached in case Alfred Sully *vs.* Red River Cattle Company *et al.*, number 900, at Dallas, is hereby approved this 24th Feb'y, 1888.

50 (Signed) A. P. McCORMICK,
U. S. Dist. Judge.

(Endorsed :) No. 900. In U. S. circuit court at Dallas, Texas. Alfred Sully *vs.* Red River Cattle Co. of Texas *et al.* Affidavits.

(Endorsed also :) No. 900. In the circuit court of the United States for northern district of Texas, at Dallas, Texas. Alfred Sully *vs.* Red River Cattle Co. of Texas *et al.* Writ of error bond. Filed Feb'y 26, 1888. (Signed) A. J. Houston, clerk. Refiled Feb'y 27, 1888. (Signed) A. J. Houston, clerk.

Waiver of Citation in Error.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

ALFRED SULLY
vs.
THE RED RIVER CATTLE CO. OF TEXAS *et al.* } No. 900.

Whereas the defendants, The Red River Cattle Co. of Texas, John H. Belcher, E. T. Morris, and Frank Houston, have sued out a writ

of error to the Supreme Court of the United States to review the final judgment rendered in this cause February 16th, 1888: Now, therefore, Alfred Sully, the plaintiff in this cause and the defendant in said writ, does hereby waive the issuance and service of a citation in error.

This April 9th, 1888.

(Signed) G. A. BROWN AND
A. T. WATTS,
Att'ys for Sully.

(Endorsed:) No. 900. Alfred Sully *vs.* Red River Cattle Co. of Texas *et al.* Waiver of citation in error. Filed April 17th, 1888. (Signed) A. J. Houston, clerk.

51 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

I, A. J. Houston, clerk of the United States circuit court for the northern district of Texas, at Dallas, do hereby certify that the foregoing is a full, true, and correct transcript of the proceedings had in case No. 900, and styled Alfred Sully *vs.* The Red River Cattle Company of Texas, John H. Belcher, E. T. Morris, and Frank Houston, all of which appears from the records of said court now in the clerk's office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Dallas, Texas, this 21st day of September, A. D. 1888, and of the Independence of the United States of America the 113th year.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON,
Clerk of said Court.

[Endorsed:] No. 900. United States circuit court, northern district of Texas, at Dallas. Alfred Sully *vs.* Red River Cattle Co. *et al.*

Endorsed on cover: N. Texas C. C. U. S. No. 1340. The Red River Cattle Company of Texas, Frank Houston, E. T. Morris, and John H. Belcher, plaintiffs in error, *vs.* Alfred Sully. Filed October 15, 1888.

Office Supreme Court U. S.
FILED.
JUL 30 1889
JAMES. H. McKENNEY,
CLERK.

No. 1340.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

THE RED RIVER CATTLE COMPANY OF TEXAS

ET. ALS. PLAINTIFFS IN ERROR,

VS.

ALFRED SULLY, DEFENDANT IN ERROR.

Error from the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR PLAINTIFFS IN ERROR.

SAWNIE ROBERTSON,
W. O. DAVIS,
Attorneys for plaintiffs in error.

THE RED RIVER CATTLE CO. OF TEXAS, ET ALS.,
No. 1340, vs.
ALFRED SULLY.

I.

On the 9th day of December, 1885, Alfred Sully, a citizen of New York, filed in the District Court of Donley County, Tex., his petition against the Red River Cattle Company of Texas, Frank Houston, E. T. Morris, and John H. Belcher, citizens of Texas. On the motion of the defendants the cause was removed on the 8th day of January, 1886, into the Circuit Court of the United States for the Northern District of Texas and a copy of the record was filed with the clerk of said court at Dallas, Tex., on the 12th day of January, 1886. On the 21st day of February, 1887, the plaintiff filed in said Circuit Court, as a substitute for his former pleading his first amended original petition, alleging:

That on the 29th day of December, 1883, said Cattle Company bargained and sold to the plaintiff for the price of $22.50 per head its stock of cattle then situated and running on the range and in the pasture of said Company in Gray and Donley Counties, Tex., guaranteeing that there were 3700 of such cattle:

That about January, 1884, plaintiff paid to said Cattle Company, $50,000 in part payment for said cattle, and some other property purchased at the same time.

That on March, 29th, 1884, said Company pursuant to said sale, executed to plaintiff a bill of sale to said cattle, in which it was agreed that plaintiff should gather them at his own expense, beginning between April 20th and May 1st, 1884, said Co., to place a man upon the ground to superintend the counting as they were gathered, the count to include all stock belonging to said Company, on the 29th day of December, 1883, and if upon a full count, there should be less than 3700, including the winter loss since December 29th, 1883, (said loss to be estimated by disinterested stock men in the Panhandle country, competent to judge in such matters) said Company should deliver to plaintiff on the

range enough other cattle to complete the requisite number of 3700, but if there should be more than 3700 upon said count, plaintiff should pay for the excess at the rate of $22.50 per head.

That plaintiff gathered said cattle, exercising great care and diligence, but during the year 1884, found and gathered only 2818 head, and during the year 1885 to October 1st, he found and gathered only 46 head, and that the winter loss upon said cattle after December 29th, 1883, was only 57 head.

That on the 7th day of February, 1885, said Company, with John H. Belcher, E. T. Morris and Frank Houston, as its sureties, executed to plaintiff a bond in the sum of $18,000, conditioned that said Cattle Company would faithfully comply with said contract.

That said Cattle Company on the 29th day of December, 1883, lacked 779 of having 3700 head ot cattle, and that the increase on said shortage would have been 600 head, and that the highest market value of said cattle since the time when the contract should have been complied with, was $25 per head, making his damages $34,500.

The defendants on February 9th, 1888, filed as a substitute for their former pleading, their first amended original answer, which embraced a general denial for all the defendants, and a plea in reconvention in behalf of said Cattle Company, alleging that it owned and had on said range and in said pasture on the 29th day of December, 1883, 4100 cattle, which could have been gathered and counted by the use of ordinary diligence, but that the plaintiff wilfully, or negligently failed to gather the same, and that the winter loss on said cattle after December 29th, 1883, was 25 per cent., claiming $9000 as a balance due said Company on said contract.

The cause was tried February 16th, 1888 resulting in a judgment in favor of the plaintiff for $17,883.93, from which the defendants have prosecuted a writ of error to this court.

The questions involved are these:

1. Under the contract, should the winter loss from Decembe, 29th, 1883, to October 1st, 1885, be added to the number of cattle actually found and counted, or should only the winter loss occurring from December 29th, 1883, to the spring of 1884, be added to the number actually found and counted.

2. Under the contract, before the Red River Cattle Company could recover for any excess over 3700 head owned by it on the 29th of December, 1883, was it necessary that more than 3700 should be actually found and counted, or was it only required that the number actually found and counted, when added to the winter loss occurring after December 29th, 1883, should exceed 3700 head.

3. The admission of the evidence of J. W. Sacra, over the objections of the defendants, who claimed that it was hearsay.

4. The refusal to allow E. F. Ikard, John H. Belcher and S. S. Maddox, witnesses for the defendants, to testify concerning the winter losses on range cattle upon the ground that they were not competent to judge, and the admission over the objections of the defendants of the evidence of Charles Goodnight concerning such losses, the defendants claiming that said Goodnight was not competent to judge, and that his evidence was but hearsay.

5. The failure of the court to construe the bill of sale and bond in his instruction to the jury, and his permitting the jury to construe the same.

6. The refusal of the court to present the law in case the plaintiff did not himself gather the cattle, but trusted the matter to his vender, the Clarendon Land & Cattle Company.

7. The right of the court, when in its optnion a verdict is excessive to direct a remitter and over-rule a motion for new trial because such remitter is afterwards filed.

8. The right of the court to leave to the jury the construction of the written contract between the parties.

These questions are raised by bill of exception taken at the time of trial, and by assignments or specifications of error based upon the bill of exception.

II.

The first specification of error is:

"The court erred in excluding the evidence of Doss Swearengen and other cattlemen, of the Texas Panhandle, competent to judge, that the winter loss on range cattle in Donley, Gray, and adjoining counties, for the winter of 1884--'5, was at least 40 per cent., the proof already having shown that the winter loss on range cattle always occurs after December 29th, as shown by the first clause of plaintiffs in error's bill of exception."

The contract of sale from the Red River Cattle Company to Alfred Sully, was in the usual form, with the exception of this provision:

"It is understood and agreed by the parties that the second party (Alfred Sully) is to commence gather said cattle some time between the 20th of April and the 1st of May, 1884; the said first party (the Red River Cattle Company) is to place a man on said ranch to superintend the count of said cattle as they are gathered, and that said count is to include all cattle of said stock existing on the 29th day of December, 1883,

and that said second party is to pay all expense of gathering and counting said stock. It is further agreed and understood that if upon a full count there should prove to be less than 3700 head of said cattle, including the winter loss since December 29th, 1883, (the loss to be estimated by disinterested stock men in the Panhandle country competent to judge in such matters) the party of the first part is to deliver to the party of the second part on said ranch a sufficient number of cattle to complete the number of 3700 head. That if there should be more than 3700 head of said cattle the said party of the second part is to pay to the party of the first part $22.50 per head for the excess above 3700 head, said payment to be made as soon as said count is completed."

The bond sued on is as follows:

Know all men by these presents that we, The Red River Cattle Company of Texas, a corporation duly created, organized and existing under and by virtue of the laws of the State of Texas, and Frank Houston, of the city of Terrell, in the county of Kaufman, in the State of Texas, and John H. Belcher and E. T. Morris, of the city of Gainesville, in the county of Cooke, in the State of Texas, are held and firmly bound unto Alfred Sully, of the city, county, and State of New York, in the sum of eighteen thousand dollars, good and lawful money of the United States, to be paid to the said Alfred Sully, his heirs, executors, administrators or assigns; for which payment, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the seventh day of February, A. D., one thousand eight hundred and eighty-five. Whereas The Red River Cattle Company of Texas bargained and sold to said Alfred Sully all that certain stock of cattle belonging to said company situated and running on the range and pasture of said company, in Gray and Donley counties, in said State of Texas, at the sum or price of twenty-two dollars and fifty cents per head, on the twenty-ninth day of December, A. D., 1883; and whereas said company have guaranteed unto said Sully, his heirs, executors, administrators, and assigns, that there were three thousand seven hundred head of cattle belonging to it in said stock running on said range and in said pasture on said last mentioned day, and that in the event there were not said number of three thousand sven hundred head of cattle on said range and in said pasture owned by said company, free from all encumbrance to its title to the same, on said day and date to deliver to said Alfred Sully, his heirs, executors, administrators, or assigns, in said pasture a sufficient number of the same kind of cattle to make up such deficiency, and to deliver to him or them such cattle of such ages as to give and secure to him or them the benefit of the growth and natural increase of said cattle since said twenty-ninth day of December, A. D. 1883:

Now, the condition of the above obligation is such that if the above bounden, The Red River Cattle Company of Texas shall deliver to said Alfred Sully, his heirs, executors, and administrators,or assigns, such cattle sufficient to make up such deficiency, if any, in accordance with said agreement, on or before the first day of October, 1885, or pay him or them all damages, costs, charges, and expenses he or they may sustain on account of failing to deliver said cattle as aforesaid, and shall abide by and fully perform and conform to the estimate, decision or decisions, award or awards of any arbitrator or arbitrators chosen by agreement of said The Red River Cattle company of Texas and the said Alfred Sully or assigns, or the order or judgment of any court of competent jurisdiction in the premises or touching or concerning the matter aforesaid or any of them, then this obligation is to be void; otherwise to remain in full force and effect.

In testimony whereof the said The Red River Cattle Company of Texas has caused its corporate seal to be hereunto affixed and these presents to be subscribed by its president and secretary, and said Frank Houston and John H. Belcher and E. T. Morris have hereunto subscribed their names and affixed their seals this seventh day of February; A. D. 1885.

THE RED RIVER CATTLE COMPANY
OF TEXAS,

[SEAL.] By FRANK HOUSTON, *Its President*

Attest: W. R. BOURLAND, *Secretary.*

FRANK HOUSTON. [SEAL.]

JNO. H. BELCHER. [SEAL.]

E. T. MORRIS. [SEAL.]

The bill of exception, after reciting the introduction in evidence of the contract of sale and bond is as follows:

"And the plaintiff having introduced evidence tending to show that from June 1st, 1884, to October 1st, 1885, the cattle embraced in said sale bill were diligently gathered by his vendee, the Clarendon Land and Cattle Company, both on said range and pasture and for a distance of one hundred and fifty miles in every direction therefrom, and that only twenty-eight hundred and eighteen were found in 1884 and forty-six in 1885; and the defendants having introduced proof tending to show that in the latter part of the summer of 1882 The Red River Cattle Company of Texas placed on said range thirty-eight hundred stock cattle, in the brands set forth in said sale bill, and branded therefrom, in the summer of 1883, nine hundred calves in the same brand and which were added to said stock, and that none of said stock or calves were sold, disposed of, or removed from said range, except four hundred and sixty-three beeves, in the summer of 1883, and that during the winter of 1882 and 1883 said cattle did well

and the losses were very slight, and that all of said cattle remained on an open range until the latter part of the summer of 1883, when a portion of them was placed in said pasture and the balance allowed to remain on open range, and that said cattle had never been counted from the time they were placed on said range until the sale to the plaintiff, and that not exceeding 60 per cent. of range cattle could be gathered in one year and during the second year not exceeding 30 per cent., the defendants thereupon proposed to prove by Doss Swearingen, and other cattlemen of the Texas Panhandle country competent to judge, that the winter loss on range cattle in Donley, Gray and adjoining counties for the winter of 1884--'5 was at least 40 per cent., the proof having already shown that the winter loss on range cattle always occurs after December 29th; but the above evidence of said Swearingen and others was objected to by the plaintiff and excluded by the court upon the ground that under said sale bill and bond the winter loss of the ungathered portion of said cattle for the winter of 1884 was the loss of The Red River Cattle Company of Texas and not of the plaintiff; to which ruling the defendants excepted."

The second specification of error is:

" he court erred in admitting the evidence of J. W. Sacra, who testified that Sacra, Sugg & Bro., of which firm witness was a member, had, during the winter of 1883 and 1884, a stock of range cattle in Donley and Gray counties, Texas, on a range adjoining The Red River Cattle Company's range, and that while witness was at said range in spring of 1884 his foreman, who had been on the range during the winter, informed him that the winter loss of the winter of 1883--'4 on cattle in the Panhandle, and especially on their own ranch, had been very light, because the same was hearsay, as shown by the second clause of the bill of exception."

The bill of exception is as follows:

2. "And the plaintiff upon said trial introduced the deposition of J. W. Sacra, who testified that Sacra, Sugg, & Bro., of which firm witness was a partner, had, during the winter of 1883 and 1884, a stock of range cattle in Donley and Gray counties, on a range adjoining The Red River Cattle Co. of Texas, and proposed to prove by said Sacra that in the spring of 1884, he, said Sacra, was at said ranch, and while there his foreman, who had been on the ranch during the winter, informed him that the winter losses of the winter 1883 and 1884 on cattle in the Panhandle, and especially on their own ranch, had been very light; to the introduction of which defendants objected, because hearsay; but the objection was overruled by the court; to which defendants excepted." (25)

The third specification of error is:

"The court erred in excluding the testimony of John H. Belcher and E. F. Ikard concerning winter losses on cattle in the Panhandle of Texas as shown in the third clause of bill of exception.".

The bill of exception is as follows:

3. 'And the defendant during said trial introduced John H. Belcher and E. F. Ikard and after proving by them that they had been engaged in the cattle business in Clay, Young and Cooke and other counties, in Texas and in the Indian Territory, for twenty-five years, and during said time had closely observed the winter losses among range cattle, and that the country which came under their observation was similar in climate, grass and winter protection to Gray and Donley counties, Texas, except that the winters in Gray and Donley are longer and more severe, and that the losses in that part of North Texas, with which they were acquainted, during the winter of 1883 and 1884 was at least 25 per cent. and that said loss occurred after December 29th, 1883; but said evidence was objected to because said witnesses were not competent to judge of the winter losses in the counties of Donley and Gray; which objection was sustained by the court and said evidence excluded; to which defendants excepted." (22)

The fourth specification of error is:

"The court erred in admitting the evidence of Charles Goodnight concerning winter losses on range cattle in the Panhandle of Texas, said testimony being heresay and the witness incompetent, as shown by the fourth clause of bill of exception." (25)

The bill of exception recites:

4. "And during the trial of said cause, the plaintiff introduced the deposition of Charles Goodnight, who had been engaged in the cattle business in Armstrong and other counties in the Texas Panhandle since 1880, and proposed to prove by him that while he had no means of estimating the winter loss among range cattle in the Panhandle for the winter of 1883 and 1884, it was estimated by stockmen in the Panhandle at two per cent.; to which defendant objected because, first, the witness disclosed that he was not competent to judge, second, there was better evidence, namely the stock men who made the estimate, but said objections were overruled by the court and said evidence admitted; to which defendants excepted." (22)

The fifth assignment of error is:

"The court erred in excluding testimony of S. S. Maddox relative to the winter losses on cattle in the Panhandle of Texas in the winter of 1883--'4, as shown by the fifth clause of bill of exception." (25)

The bill of exception recites:

5. "And defendants upon the trial of this cause, introduced S. S. Maddox and proposed to prove by him that since the summer of 1882 he has resided in Wichita county, Texas, and has been the agent for commission houses in Chicago, Ill., who advanced money to Texas cattle men upon the faith of their cattle shipments, and that as a part of his duty to investigate and report the condition of cattle in Northwest Texas and the Panhandle, to the houses which he represented, and especially the winter

losses among cattle, and that among the customers of his house during the year 1883 and 1884 were several cattlemen of Gray and Donley counties, and that during the winter of 1883 and 1884, the witness made diligent inquiry to ascertain the winter losses in said section, and that they were estimated in that portion of Texas, west of Wichita county, including Gray and Donley counties, at 25 per cent., and that in the opinion of the witness the winter losses in said section in the winter of 1883 and 1884, were at least 25 per cent. But said evidence was objected to by the plaintiff, because said witness was not competent to judge of the winter losses in Gray and Donley counties; which objection was sustained by the court and said eveidence excluded; to which defendants excepted." (22)

The sixth specification of error is:

"The court erred in directing the jury to disregard defendant's plea in reconvention, as shown by sixth clause of bill of exception." (25)

The bill of exception recites:

"And the defendants introduced evidence tending to show that the winter loss of 1883 and 1884, occurred after December 29th, and that such loss ranged from 6 to 40 per cent., and that after December 29th the cattle sold by The Red River Cattle Company to plaintiff were not favorably situated for passing the winter without loss, and that said company branded and turned loose on said range in the summer of 1883, in the brands sold to plaintiff, nine hundred calves, of which only four hundred and eighty-seven were found and counted by plaintiff's vendee durring the years 1884 and 1885, and that of the cattle turned loose on said range during the year 1882 there should have been,if there was no loss,two thousand cows in 1884, but that in 1884 and 1885 the plaintiff's vendee only found and counted thirteen hundred and twenty-one, and that the other grades of cattle gathered and counted by plaintiff's vendee during the years 1884 and 1885 fell short the number placed on the range in a similar proportion, and that in the year 1882 The Red River Cattle Company of Texas place on said range thirty-eight hundred head of stock cattle, which, added to the calves of 1883, would make forty-seven hundred head of cattle, and it only sold or removed from said range four hundred and sixty-three beeves, and that during the winter of 1882 and 1883 the said cattle wintered well and the losses were very light, and that said cattle never had been counted since they were placed on the range until they were gathered and counted by the plaintiff's vendee during years 1884 and 1885 The court directed the jury to disregard defendant's plea in reconvention, as there was no evidence to support it, the court holding that the right of defendant, The Red River Cattle Company, to recover for any excess in said cattle over thirty-seven hundred head depended upon there being actually found and counted a number of cattle exceeding thirty-seven hundred head." (22)

The seventh specification of error is:

"The court erred in its instruction to the jury, as shown by the seventh clause, of bill of exception." (25)

The bill of exception recites:

And after the evidence was closed the court proceeded to orally instruct the jury as follows:

"The contract sued on by the plaintiff has been read to you in evidence, and is so plain that I do not deem it necessary to construe it, but will leave that to you."

To which the defendants excepted, because it was the duty of the court and not of the jury to construe written contracts. (25)

The eighth specification of error is:

"The court erred in its instruction to the jury, as shown by eighth clause of bill of exception." (25)

The bill of exception recites:

"The proof introduced by the plaintiff upon the trial tended to show that he did not gather and count the cattle purchased of the Red River Cattle Company of Texas, but soon after his purchase and before the cattle were gathered, he sold said cattle to the Clarendon Land and Cattle Company, and his said vendee gathered and counted said cattle, the evidence showing that during the greater portion of the count in 1884 The Red River Cattle Company of Texas was represented on the ground by one Hudson, who quit during the fall of 1884 because plaintiff refused to pay him for his services, upon the ground that under the contract The Red River Cattle Company should pay for such services, and that afterwards said company was not represented or on the ground during said count, and no objection was made to the cattle being gathered and counted by plaintiff's vendee, and upon this subject defendant requested the court to charge the jury as follows:

Under the contract, alleged in the petition it was the duty of the plaintiff to gather and count the cattle purchased of The Red River Cattle Company of Texas, and said duty or right could not be transferred to another; and if the plaintiff has not gathered and counted said cattle he has no right to maintain this suit; which instruction the court declined to give or any other upon said subject; to which defendants excepted." (22–24)

The ninth specification of error is:

"The court erred in refusing to set aside the verdict of the jury because excessive, and in allowing the defendant in error to remit five thousand dollars of the same, as shown by the ninth clause of bill of exception." (25)

The bill of exception recites:

9 "And after the jury had returned thei rverdict herein and within one day thereafter the defendants filed their motion for a new trial, because, among other things, the verdict was excessive; and upon hearing of said motion the court announced that, in its opinion, said verdict was excessive and larger than authorized by the evidence, and that unless the plaintiff would remit five thousand dollars of the same he would grant said motion; and thereupon plaintiff entered said remitter, and said motion was overruled; to which defendants objected, because if, in the opinion of the court, the verdict was excessive a new trial should have been been granted for there is no standard determining the excess, and after the remitter, the verdict is that of the court and not of the jury." (24)

The tenth specification of error is:

"The court erred in refusing to set aside the verdict of the jury and grant a new trial, because said verdict will not support any judgment against The Red River Cattle Company of Texas, for the amount found against the sureties or bondsmen, and because a verdict cannot be rendered against one defendant individually, and also at the sam e time jointly with other defendants, and because a judgment cannot be rendered against a surety without rendering judgment at the same time against the principal, as shown by tenth clause of the bill of exception." (26)

The bill of exception recites:

10. "And after the return of the verdict in this cause, said verdict being as follows:

"We the jury find for the plaintiff in the sum of eighteen thousand eight hundred and ten dollars, with interest at 8 per cent. from October 1st, 1885, to date; amount of interest, $3,573.90, making a total of $22,383.-90, of which $18,000 and interest, $3,420, is vs. the bondsmen and $810 and interest, $153.90 is vs. The Red River Cattle Company.

(Signed.) H. S. ERVAY,

Foreman."

The defendants, within one day thereafter, filed a motion to set aside said verdict and for a new trial herein because said verdict would not support any judgment against The Red River Cattle Company of Texas for the amount found against the sureties or bondsmen, and because judgment cannot be rendered against one defendant individually and at the same time against him and other defendants jointly, and because a judgment cannot be rendered against sureties without rendering judgment at the same time against the principal." (24)

III.

1. It seems to us that the court did not construe the contract aright in holding that after the beginning of the spring of 1884 the ungathered cattle were at the risk of The Red River Cattle Company.

Upon this construction, the evidence of Doss Swearengen as to the losses during the winter of 1884--'5 was excluded. If this construction is wrong, the exclusion of the evidence cannot be justified. The sale was for the price of $22.50 per head; the guaranty was of 3700 head on the 29th day of December, 1883, and the cattle were sold as they existed at that date. The count was to be full and complete, and to include all cattle of said stock existing on the 29th day of December, 1883. It is clear then that from the 29th day of December, 1883, unitl the full count provided for in the contract, the cattle were at the risk of Sully the purchaser. This is as it should be; for on the 29th day of December, 1883, the cattle were sold and delivered to him, and from that time were in his possession and under his control, and were not insured to live. If the contract had stopped with saying that the count should be full and embrace the cattle as they existed on December 29th, 1883, its meaning even then would be free of all doubt. The contract, however, goes even further and expressly says that the winter loss occurring after December 29th 1883 should be counted and paid for by the purchaser. Now when was this full count to take place? Is there upon the face of the contract, or in the conduct of the parties or in the circumstances surrounding them anything to lead to the conclusion that the full count should be had before the beginning of the next winter? The proof is that not exceeding 60 per cent of the cattle could have been gathered by that time. It is not reasonable that an impossibility was intended. The parties did not so understand their contract, for Sully the purchaser, not only gathered and counted the cattle during the whole of 1884, but until October 1885. It is not alleged or claimed that a full count was had before the winter of 1884-'5, or that the failure to have such full count was due to any fault of the Red River Cattle company. The bond sued on, executed on the 7th day of February 1885, long after the full count should have been completed under the construction of the court, as well as conduct of Sully the purchaser shows that it was understood by the parties that the full count need not be had or the gathering cease until the first day of October 1885. In the consideration of contracts, the construction placed upon them by the parties, showing their understanding of their terms, is always entitled to great weight.

Railroad Co. vs. Trimble, 10 Wall. 367.

By the terms of the contract, it was the duty of Sully, the purchaser, to show by a full count that there were not 3,700 cattle in the stock on the 29th of December, 1883, before he could recover for any shortage. The cattle were delivered to him, the gathering was entrusted to him and it was within his power to have the full count contemplated in the contract.

2. The evidence of J. W. Sacra falls clearly under the elementary definition of hearsay. He was at the ranch of Sacra, Sugg & Bro. in the spring of 1884, and then had a conversation with his foreman who had spent the winter in the Panhandle. The foreman, speaking in reference to something that was past, said: "The winter losses for the winter of 1883-'4 on cattle in the Panhandle and especially on their own ranch has been very slight." The evidence of the foreman, if produced upon the stand, would certainly have been better than Sacra's second-hand narration of it. The admission of this evidence can not be justified. A clearer case of hearsay could not be imagined.

Hopt vs. Utah, 110 U. S. 581.

Mima Queen vs. Hepburne, 7 Cranch, 290.

1 Greenleaf Ev §99.

3. We submit that the evidence of Belcher, Evans and Maddox, and especially that of Maddox, was admissible. The two first had been engaged in the cattle business in northwest Texas, in a country similar to the counties of Gray and Donley for twenty-five years, and during that time had closely observed the winter losses on range cattle. Maddox not only resided in northwest Texas near the Panhandle, but was the agent for a Chicago commission house, whose business it was to advance money to Texas stockmen upon the faith of their cattle and cattle shipments. Several of the customers of his house had ranches in the counties of Gray and Donley. It was a part of his duty to know and to report to his house the condition of cattle in said counties, and the winter loss among the same. And in discharge of this duty, during the winter of 1883-'4, he made diligent inquiry to ascertain the winter loss in said counties of Gray and Donley, and it was estimated by stockmen therein at 25 per cent, and in his opinion was at least 20 per cent.

But be this as it may, after drawing the line so as to exclude S. S. Maddox, it was clearly erroneous to admit the evidence of Charley Goodnight, who was, in the opinion of the court, a competent judge of winter losses among range cattle in the counties of Gray and Donley. Mr. Goodnight had been engaged in the cattle business in Armstrong and other Texas Panhandle counties, since 1880, but whether he resided on the ranch and personally superintended the business, or entrusted it to a foreman does not appear, nor does it appear that he was in the Panhandle

in the winter of 1883-'4. He said he had no means of estimating the winter losses on range cattle in the Texas Panhandle during the winter of 1883–'4, but they were estimated by stockmen in the Panhandle at 2 per cent. As an expeet on winter losses Mr. Goodnight was a failure. Was his evidence as to the estimate made by stockmen admissible? It was clearly hearsay and showed upon its face the existence of better testimony. He had as well during the progress of the trial talked to a few Panhandle stockmen and then testified as to their opinion. When S. S. Maddox proposed to testify as to the opinion of Panhandle stockmen, his evidence was excluded, and when he sought to give his own opinion that was also excluded, yet Mr. Goodnight was allowed to testify as to the opinion of one class of men, and Maddox was denied the right to testify as to the opinion of the same class.

4. Was the court justified in directing the jury to disregard defendants plea in reconvention? The proof tended strongly to show that on December 29th 1883, the Red River Cattle company had on its range and in its pasture 4,100 head of cattle. Out of 900 calves, branded in 1883, only 463 were gathered and counted, out of about 2,000 cows, only 1,321 were gathered and counted. The other grades fell short in a similar proportion. The winter losses among range cattle always occur after December 29th. The facts show heavy losses among the cattle after December 29th 1883, or careless or inefficient gathering. The court realized that the plaintiffs in error had introduced proof strongly tending to show that the Red River Cattle company had much more than 3,700 cattle on its range and in its pasture on the 29th day of December 1883. The court, however directed the jury to disregard the plea in reconvention construing the contract to mean that at least 3,700 should be gathered and counted before the cattle company could recover for any excess.

Under this construction if the cattle company had in fact 5,000 cattle, the purchaser could prevent a recovery for any excess by not gathering at all or by gathering imperfectly so as not to count more than 3,700. If he gathered precisely 3,700 though there might be 2,000 ungathered cattle, or 2,000 might have died since the making of the contract, he would not pay for the 2,000, but if by an error in judgment he should gather 3,701, he would be liable to pay for the 2,000. We don't think the contract admits of any such construction. To our mind it clearly means that Sully, the purchaser, was to pay $22.50 per head for all the cattle the Red River Cattle company owned and had on its range and in its pasture on Deeember 29th 1883 at the time of the making of the contract. If upon a full count including all cattle as existing at said time, there was less than 3,700, the seller was to pay for the deficiency, and if upon the same count there proved to be more than 3,700 head the purchaser was to pay for the excess. If the

court will observe the bill of sale it will be seen that it provides for a full count of the cattle as they stood on the 29th of December 1883, including the winter loss occurring after said date, and then says that if upon such count there should be less than 3,700 cattle the seller should make up the deficiency. But if there should be more than 3,700 head of said cattle, the purchaser should pay for the excess at the rate of $22.50 per head, "said payments to be made as soon as said count is made." There is not to be one count for the seller and another for the purchaser.

5. It is the duty of the court to construe written contracts, and not to leave their construction to the jury.

Goddard vs. Foster, 17 Wall. 123.

The court failed to construe this contract, not because it was expressed in doubtful or technical words or phrases that to be understood had to be read in the light of parol evidence, explanatory of their meaning, but because the meaning of the contract, in the opinion of the court, was so plain. The court thought it too clear for argument that the contract meant one thing, and counsel for the defendants thought it equally clear that it meant the reverse. We cannot say what the jury thought, for their deliberations are secret and their construction cannot be made matter of record, and for that reason they ought not to construe a contract at all. It is evident that they did not see as the court saw, or they would have agreed with the court as to the measure of damages.

There are other errors complained of, but believing that those already discussed will necessitate a reversal of the case, we deem it unnecessary to discuss them as they will probably not occur upon another trial.

All of which is respectfully submittted.

SAWNIE ROBERTSON,
W. O. DAVIS,
Attorneys for plalntiffs in error.

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JAMES H. McKENNEY
Clerk

In the Supreme Court OF THE United States.

THE RED RIVER CATTLE CO., OF TEXAS, ET AL.,
Plaintiffs in Error,

vs.

ALFRED SULLEY, *Defendant in Error.*

Brief of Defendant in Error.

JAS. W. BROWN,
Attorney for Def't. in Error.

WILMANS PTG. HOUSE, 179 ELM ST., DALLAS.

In the Supreme Court of the United States.

THE RED RIVER CATTLE CO., OF TEXAS, ET AL.,
Plaintiffs in Error,

vs.

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Brief of Defendant in Error.

I.

As a copy of the record was not furnished to the attorney of defendant in error, within the time prescribed for correcting errors and omissions therein, under the rules, I would respectfully call the attention of the court to the fact that the bill of sale, of date March 29th, 1884, although made an exhibit to the amended petition is not copied into transcript of the record, R. 3. It is believed that a cursory examination of the record will show the importance of having that instrument before the court in a judicial examination of the questions presented by Plaintiffs in Error. While the bond of date February 7th, 1885 (R. 12 and 13) is the foundation of the suit; the bond is predi-

cated upon the bill of sale, and its provisions are materially effected by the terms thereof.

II.

There is no date fixed in the bill of sale as to when the final count was to be made and the contract closed. See brief of Plaintiffs in Error, pages 3 and 4.

The bond which was executed February 7th, 1885, provided that the requisite number of cattle to make up the shortage should be delivered "on or before the first day of October, 1885." As appears from the record defendant in error had retained about thirty thousand dollars of the purchase price of the stock of cattle to insure the delivery of the 3,700 head of cattle, and the bond was exacted and given before defendant in error would pay the same. It was to obtain this retained purchase money that the bond was executed. R. p. 4.

It will be observed that the bill of sale, as quoted in the brief of plaintiffs in error, stipulated "that if upon a full count there should prove to be less than 3,700 head of said cattle, including the winter loss since December 29th, 1883 (the loss to be estimated by disinterested stockmen in the Panhandle Country competent to judge in such matters) the party of the first part is to deliver to the party of the second part on said ranch a sufficient number of cattle to complete the number of 3,700 head." While the bond after stipulating for the delivery of a sufficient number of the same kind of cattle to make up the deficiency and fixing the time "on or before the first day of October, 1885," for such delivery, further stipulates for the delivery of cattle "of such ages as to give and secure to him or them the benefit of the growth and natural increase of said

cattle since said twenty-ninth day of December, A. D. 1883." In short, the bond stipulated for the growth and natural increase of the shortage, while the bill of sale stipulated for deficiency in number only.

The first question presented for determination arises out of the language "including the winter loss since December 29th, 1883" contained in the bill of sale. It was contended by plaintiffs in error in the trial court, as they contend here, that the meaning and intent of the contract was to include winter loss occuring after the 29th day of March, 1884, that is, losses occurring during the subsequent winter of 1884 and 1885. In estimating the winter loss the court limited the investigation to the loss occurring between the 29th day of December 1883 and the 29th day of March, 1884, and upon that construction of the contract, excluded evidence estimating the per centage of loss of cattle in the Panhandle Country during the subsequent winter. On the 29th day of December 1883 the contract of purchase was made, which was consummated by the execution and delivery of the bill of sale on the 29th day of March, 1884. The contract of purchase stipulated for 3,700 head of cattle. At the time the bill of sale was executed the winter had passed and the winter loss had already occurred. Obviously it was to the loss then already occurred that the minds of the parties were directed. There was no time fixed in the bill of sale for the final count and it is but reasonable to suppose that the parties then contemplated the consummation of the entire matter before the approach of another winter. In the contract of purchase the vendor had guaranteed that there were as many as 3,700 head of the cattle, on that date, to-wit, December 29th, 1883. Now when it came to executing the

bill of sale, some three months after that date, the winter loss then already having occurred, it was natural for the vendor to insist upon including that loss in the estimate, hence the language "including the winter loss since December 29th, 1883."

It was as to the then condition of the catlle that the parties' minds met. The vendor agreed that there was 3,700, less the winter loss since December 29th, 1883, and if upon a full count there should be less than that number, then the vendor agreed to deliver a sufficient number of cattle to make good the shortage. Obviously, considering the occasion, circumstances and surromndings the loss stipulated against was that which had then occurred.

As before remarked, the parties must have contemplated that the final count would be had and the entire matter closed before another winter came on, and it was to secure this that the vendee retained and held back the $30,000 of the purchase price of the cattle.

A diligent search during the summer and fall of 1884 of a radius of one hundred and fifty miles had only secured 2,818 head of the cattle, and the vendor was anxious to obtain the retained purchase money, to that end, and for that purpose the bond was executed. By the terms of the bond a shortage in the number of cattle is implied and contemplated, as its conditions were the delivery on or before the 1st day of October 1885 of a sufficient number of cattle to make good the shortage.

See Bradley v. Washington &c. Packet Co., 13th Peter, 89;

Maurau v. Bullus, 16th Peter, 528;

Chesapeake & O. Canal Co. v. Hill, 15th Wall, 94;

Mobile & M. R. Co. v. Jury, 111th U. S., 584.

It is a correct rule, that, where the language of an instrument requires construction, it shall be taken most strongly against the party making the instrument.

Orient Mut. Ins. Co. v. Wright, 1st Wall, 456;

Garrison v. United States, 7th Wall, 688;

Noonan v. Bradley, 9th Wall, 394.

It is respectfully submitted that the court correctly excluded the evidence offered as to estimate of loss in the Panhandle Country during the subsequent winter of 1884 and 1885.

III.

Plaintiffs in error contend that the trial court erred in excluding the evidence of the witnesses, Belcher, Ikard and Maddox, as to the per centage of loss of cattle in the counties of Donley and Gray during the winter of 1883 and 1884. It appears that Belcher and Ikard had been engaged in the cattle business for a number of years in the counties of Clay, Young and Cook and the Indian Territory, the counties named are not in the Panhandle Country and are some 150 miles to the south and east of Donley and Gray Counties, nor is it made to appear that either of these witnesses were in or about the Panhandle of Texas, in 1883 and 1884. The witness Maddox resided in Wichita County a distance of about 150 miles from Gray and Donley Counties, and was not a stockman in the Panhandle Country. The contract provides that the winter loss is to be estimated by disinterested stockmen of the Panhandle Country, competent to judge such matters. The parties had the capacity to contract, and by their mutual stipulations determined the mode, manner and means of estimating the winter loss.

It does not appear from the record that either of these three witnesses had any personal knowledge of the per centage of loss of cattle in the Pandandle Country during that winter. However, it does appear from the record that neither of them were stockmen of the Panhandle country. The trial court, with all the facts then adduced in evidence, held that the evidence offered did not come within the stipulation of the parties, and it is submitted that the exclusion of the proposed evidence was correct.

IV.

It appears from the record that Chas. Goodnight had been engaged in the cattle business in Armstrong and other counties of the Panhandle country since 1880. His deposition was read as evidence upon the trial. The objection taken was to but one statement of the witness, the substance of which was that while he had no personal means of estimating the winter loss in that country of cattle on the range, that for the winter of 1883 and 1884 such loss was estimated by the stockmen of that country at two per cent. With the entire deposition before it, the trial court held that Goodnight was a stockman of the Panhandle country, and competent to judge in such matters. The bill of exceptions does not show that the court erred in this holding, but the objection is confined to the statement that stockmen of the Panhandle country estimated the winter loss during the time to which the investigation was confined at two per cent.

In this connection, it might be properly stated that the Panhandle of Texas embraces over 25,000 square miles, and in 1883 and 1884 was devoted exclusively to stock

raising, the ownership of which was in large herds, running in extensive pastures and upon the open range. In the nature of things, no one could have any definite personal knowledge of the winter loss, except, perhaps, in his own herds. It was to meet this difficulty, doubtless, that the parties adopted the means of estimating the loss, specified in the contract. It could not have been intended that, in determining the loss, should that investigation become necessary, that the parties should produce as witnesses all or even a majority of the stockmen of that section. Clearly, it was the intention of the parties, that, in arriving at the winter loss, the general estimate of the stockmen of that section competent to judge in such matters, was to be taken. In arriving at that general estimate, much was necessarily left to the discretion of the court. As the parties had, by their agreement, in this respect, dispensed with the ordinary rules of evidence, the trial court, in the exercise of a sound discretion, admitted such, and only such, evidence as tended to establish the winter loss upon the basis fixed by the parties.

The objections are technical. The bills of exceptions contain only the scraps of evidence to which the objections were taken, and do not show the mass of evidence adduced by the parties, nor do they show the connection of these excerpts with the bulk of evidence before the court. All of which, it seems, would be necessary to enable this court to determine whether or not the trial court had abused the discretion necessarily exercised by it under the agreement of the parties.

It is submitted that the evidence admitted tended more or less strongly to establish the general estimate of the winter loss in the Panhandle country by stockmen of

that section. And that there is no good reason why the judgment should be reversed for the admission of evidence objected to by plaintiffs in error.

V.

Plaintiffs in error complain that the verdict is not sufficient to authorize the judgment rendered against them. The cause of action was upon the bond, to the amount therein specified, and interest, and against the Red River Cattle company, for the balance claimed by defendant in error. By reference to the pleadings, the verdict is rendered certain. The finding was against the principal and sureties on the bond for the $18,000 principal and the $3,420 interest, and in addition thereto, against the Red River Cattle Company for the $810 and interest, $153.90.

The rule is well settled that the verdict is sufficiently certain if it can be rendered certain by reference to the record.

See Smith vs. Johnson, 8th Texas, 418.

Avery vs. Avery, 12th Texas, 54.

Pearce vs. Bell, 21st Texas, 688.

Obviously, the jury could not have found against the sureties without also finding against the principal on the bond. Even if it could be held that the principal is not included in the term, "the bondsmen," still the rule is that where a finding of the jury, under the issue submitted to them, could not possibly have been arrived at without also finding another fact not expressed but necessarily included in the verdict, judgment could be rendered as if that fact had been positively found.

Pearce vs. Bell, *Supra*.

Jones vs. Ford, 60th Texas, 131.

VI.

As to the remittitur, and acceptance thereof by the court, it is submitted that the proceeding was authorized and warranted by the law.

Alabama Gold Life Insurance Company vs. May Alice Nichols, 109th U. S., 232.

VII.

In conclusion, it is submitted that the record fails to show any such error of law, or abuse of discretion upon the part of the trial court as would require the reversal of the judgment.

Respectfully submitted,

JAS. W. BROWN,

Attorney for Def't. in Error.